

*United States Court of Appeals  
for the  
District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



748

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,303

J. BENJAMIN SIMMONS, CAVEATEE

*Appellant*

v.

ELSIE M. PENNEY, ET AL., CAVEATORS

*Appellees*

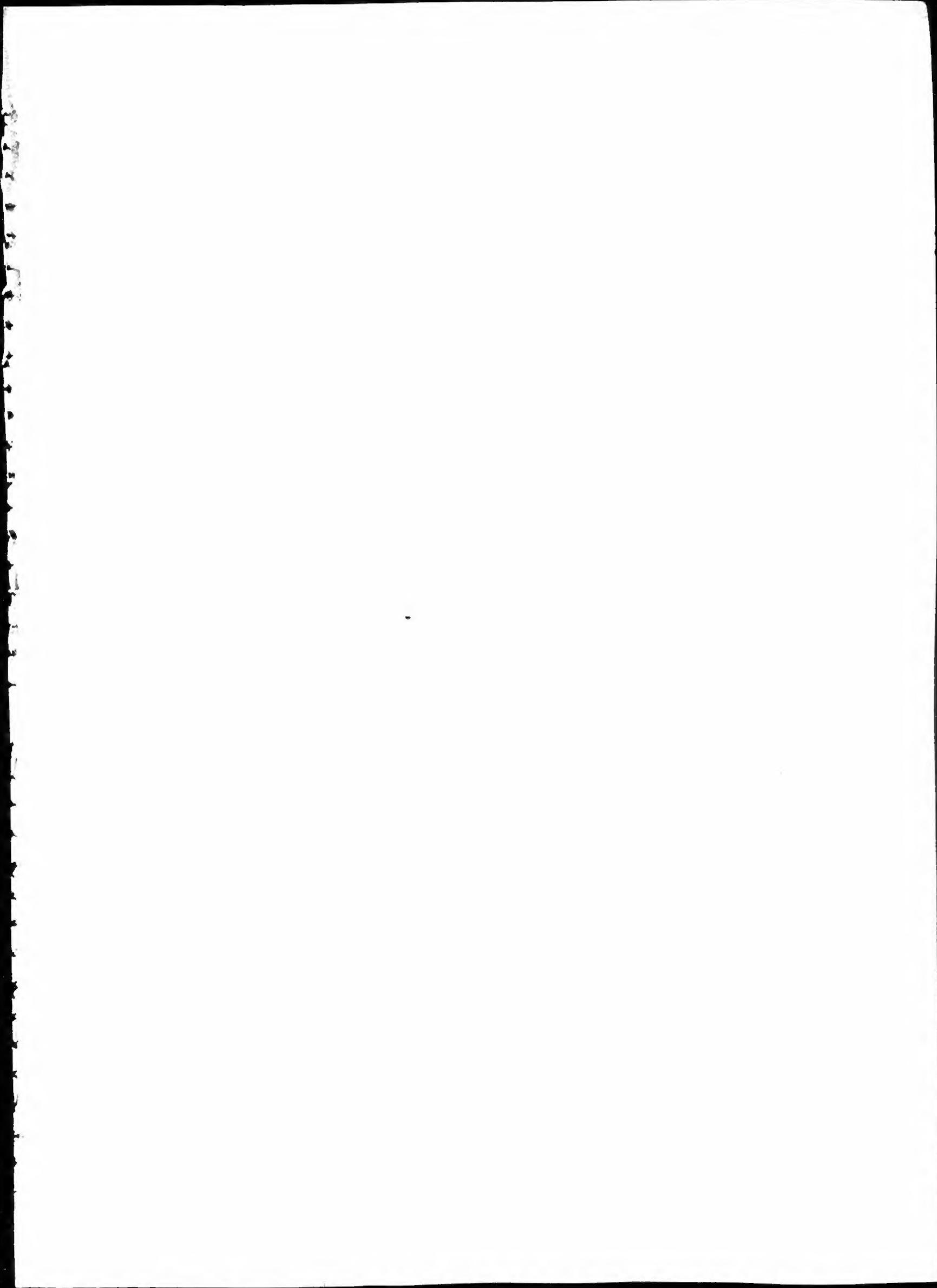
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

Washington, D. C. 20530

FILED SEP 26 1966

*C. W. Johnson*



## TABLE OF CONTENTS

Last Will and Testament of Emma O. Lester, filed Sept. 16, 1965 . . . . .	1
Petition for Probate and Letters Testamentary, filed Oct. 8, 1965 . . . . .	3
Petition for Caveat, filed Oct. 27, 1965 . . . . .	5
Answer to Petition for Caveat, filed Nov. 2, 1965 . . . . .	7
Order Framing Issues, filed Nov. 10, 1965 . . . . .	9
Order Authorizing Employment of Counsel, filed Dec. 7, 1965 . . . . .	10
Praecipe of appearance, filed Jan. 28, 1966 . . . . .	11
Pretrial Proceedings, filed Jan. 28, 1966 . . . . .	11
Order Fixing New Date for Trial of Issues, filed Jan. 28, 1966 . . . . .	15
Clerk's minute entry No. 6, March 23, 1966 . . . . .	15
Order Denying Probate, Gasch, J., filed Mar. 29, 1966 . . . . .	17
Memorandum of Register of Wills . . . . .	18
Order Granting Administration, filed Mar. 31, 1966 . . . . .	18
Motion for Judgment N. O. V. or in the Alternative for a New Trial, filed April 5, 1966 . . . . .	19
Objections to Motion for Judgment N.O.V. or in Alternative for New Trial, filed April 11, 1966 . . . . .	20
Order Overruling Motions for Judgment N.O.V. and for a New Trial Denying Motions to Set Aside Order Appoint- ing Administrator, and Motion for Appointment of a Collector Pending Caveatee Appeal, filed May 5, 1966, Holtzoff, J. . . . .	21
Memoranda of Register of Wills . . . . .	22
Notice of Appeal . . . . .	22(i)
Death Certificate . . . . .	23
Testimony of George Ferraiuolo Direct Examination . . . . .	24
Cross Examination . . . . .	27
Testimony of Nancy Ferraiuolo Direct Examination . . . . .	30
Cross Examination . . . . .	33

Testimony of Elsie M. Pinney	
Direct Examination	37
Cross Examination	49
Redirect Examination	57
Testimony of Walter Bailey	
Direct Examination	57
Cross Examination	73
Redirect Examination	87
Recross Examination	88
Further Redirect Examination	89
Testimony of Raymond H. Bailey	
Direct Examination	89
Cross Examination	94
Redirect Examination	96
Testimony of Bebe Bailey	
Direct Examination	96
Cross Examination	100
Redirect Examination	103
Testimony of Barbara Buxton	
Direct Examination	105
Testimony of Lillian Bailey	
Direct Examination	106
Cross Examination	109
Redirect Examination	112
Testimony of Marie Bailey	
Direct Examination	112
Cross Examination	124
Redirect Examination	129
Testimony of Harold Haynes	
Direct Examination	130
Cross Examination	135
Redirect Examination	137
Testimony of J. Benjamin Simmons	
Direct Examination	139
Testimony of Hyman David Shapiro	
Direct Examination	142
Cross Examination	146
Redirect Examination	150
Testimony of Raymond Leon Fisher	
Direct Examination	151
Cross Examination	156
Redirect Examination	159

Testimony of Raymond Leon Fisher	
Direct Examination .....	162
Cross Examination .....	182
Redirect Examination .....	210
Recross Examination .....	211
Testimony of Albert W. Pullman	
Direct Examination .....	212
Cross Examination .....	213
Testimony of Mary S. Baker	
Direct Examination .....	214
Cross Examination .....	216
Testimony of Lawrence D. Summerfield	
Direct Examination .....	217
Testimony of Lillian D. Brennan	
Direct Examination .....	230
Cross Examination .....	233
Testimony of Emma J. Tull	
Direct Examination .....	234
Cross Examination .....	236
Testimony of Evelyn Fisher	
Direct Examination .....	240
Cross Examination .....	242
Testimony of J. Benjamin Simmons (recalled)	
Direct Examination .....	244
Cross Examination .....	256
Further Direct Examination .....	257
Testimony of David E. Jones	
Direct Examination .....	258
Cross Examination .....	262
Testimony of Oscar R. Burkette	
Direct Examination .....	264
Cross Examination .....	266
Testimony of Alex Galante	
Direct Examination .....	266
Cross Examination .....	267
Testimony of Geraldine Bracken	
Direct Examination .....	269
Cross Examination .....	270
Motions for directed verdict .....	275
Court's Charge to the Jury .....	292

*(iv)*

Jury Verdict .....	309
Proceedings on motion for judgment n.o.v. .....	312
Caveatee-Appellant's Designation of the Record .....	316

[Filed Sept. 16, 1965 ]

**LAST WILL AND TESTAMENT  
OF  
EMMA O. LESTER**

I, Emma O. Lester of 1625 S Street S.E. Washington, D.C. being of sound and disposing mind, do hereby make, publish, and declare this my last Will and Testament. I hereby revoke and annul all wills, codicils and other testamentary dispositions heretofore made by me.

FIRST, it is my will that all my just debts and funeral expenses shall be paid by my executor hereinafter named as soon after my decease as shall be convenient.

SECOND, I give, devise and bequeath to my brother Walter Bailey \$3,000.00. To my sister Elsie Pinney \$3,000.00. To my sister Marie Bailey \$1.00. To my nephew Raymond Bailey \$3,000.

To my good neighbors Mr. and Mrs. Burdette \$500.00. To Father Flannigans Boys Town \$100.00. To Aspin Hill Pet Cemetery \$100.00.

I wish to leave my Deale Beach Maryland property and my collie dog Laddie to Mr. Raymond Leon Fisher with the stipulation that he retain the property for Laddies enjoyment during his lifetime.

My savings accounts at First Federal and Metropolis Building Association should take care of the above bequests.

I wish to be buried in Cedar Hill Cemetery next to my mother.

Mr. Fisher knows where my deeds, passbooks and personal papers are located and he has been instructed to deliver them and my will to Mr. Benjamin Simmons in case of my death.

All the rest and residue of my estate, both real, personal and mixed, I give, devise, and bequeath to my good friend Raymond Leon Fisher of 1319 N. Adams Street Arlington Virginia and his wife Evelyn

to them and their heirs and assigns forever, share and share alike, as tenants in common.

AND LASTLY, I do hereby nominate, constitute and appoint my lawyer J. Benjamin Simmons 1010 Vermont Ave N.W. D.C. as executor of this, my last Will and Testament, and I desire that my executor hereinbefore named shall not be required to give bond for the faithful performance of the duties of that office.

IN TESTIMONY WHEREOF, I have set my hand and seal to this, my last Will and Testament, at Washington, D.C. this first day of July in the year of our Lord one thousand nine hundred and 65.

/s/ Emma O. Lester [Seal]

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SIGNED, SEALED, PUBLISHED, and DECLARED, by Emma O. Lester the above-named testator, as and for her last Will and Testament, in our presence, and at her request, and in her presence, and in the presence of each other, we have hereunto subscribed our names as attesting witnesses.

/s/ George Ferriuolo  
1643 Colonial Terr. Arl. Va.

/s/ Nancy Ferriuolo  
1643 Colonial Terr Arl.Va

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[Filed Oct. 8, 1965]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Holding a Probate Court

IN RE ) Administration No. \_\_\_\_\_  
ESTATE OF )  
EMMA O. LESTER, Deceased ) Address of Petitioner:  
 ) 1010 Vermont Avenue,  
 ) N.W.  
 ) Washington, D.C. 20005

**PETITION FOR PROBATE AND LETTERS TESTAMENTARY**

The petition of J. Benjamin Simmons respectfully represents:

1. That he is a citizen of the United States and a resident of the State of Maryland, of adult age, and not under any legal disability, and he makes this application as the Executor nominated in the Will of the above-named decedent.

2. That Emma O. Lester, late an adult citizen of the United States, domiciled in the District of Columbia, died on the 15th day of September, 1965, leaving a paper in the nature of a Last Will and Testament, bearing date the 1st day of July, 1965, in which this petitioner is named as Executor, which said Will is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and this petitioner believes that the aforementioned paper is in fact the Last Will and Testament of said decedent.

3. Testatrix was survived by the following persons, who are her only heirs at law and next of kin, namely, Walter Bailey, her brother; Elsie Pinney, her sister, and Marie Bailey, her sister; that Marie Bailey, aforementioned, is a resident of the District of Columbia, and the other sister and brother are non-residents of the District of Columbia.

bia, namely, residents of the State of Maryland. That your decedent was not survived by a spouse, and she was not survived by any child, descendant, parent, brother, sister, or descendant of a brother or sister except the aforesaid.

4. At the time of her death, said testatrix was seized of the following real estate in the District of Columbia: Lot 143 in Square 5605, improved by premises No. 1525 S Street, N.W., which property was assessed for tax purposes at a value of \$6,474.00, and which is free from encumbrance. That the said testatrix was seized of the following real estate in the County of Anne Arundel, State of Maryland, namely, Lots 51 to 53 inclusive, Block K of "Deale Beach" Subdivision, and Lots 45 to 50 inclusive of Block K of "Deale Beach" Subdivision, having a total assessed value of \$8,735.00, and which is free from encumbrance.

5. Said testatrix was possessed at the time of her death of personal property of the total estimated value of \$20,719.00 and consisting of about \$20,162.00 in money on deposit in the Metropolitan Building Association, Washington, D.C., and First Federal Savings and Loan Association, Washington, D.C.; furniture, personal effects and jewelry valued at about \$500.00, and an automobile believed to be worth \$100.00.

6. The debts of the decedent consist principally of funeral and last illness expenses, estimated at \$1,325.00.

WHEREFORE, Petitioner prays:

1. That notice by citation or by publication or by both, as may be necessary, shall issue directed to the above-named heirs at law and next of kin.

2. That said paper writing dated the 1st day of July, 1965, be admitted to probate and record as the Last Will and Testament of the said Emma O. Lester, deceased, as a will of both real and personal property.

3. That letters testamentary issue to this petitioner as the Executor named in the will.

4. And for such other and further relief as the nature of the case may require and to this Honorable Court may seem just and proper.

J. Benjamin Simmons

WARD AND SIMMONS

By J. Benjamin Simmons  
Attorneys for Petitioner

[Notary's jurat, 8 Oct. 1965]

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[Filed Oct. 27, 1965]

PETITION FOR CAVEAT

The petition of WALTER BAILEY, ELSIE M. PINNEY, and MARIE BAILEY respectfully represent to this Honorable Court:

1. That they are adult citizens of the United States; that MARIE BAILEY resides at 604 Aspen Street, N.W., Washington, D.C., WALTER BAILEY resides at 1201 Burton Street, and ELSIE M. PINNEY resides at 8019 Eastern Avenue, Silver Spring, Maryland; that WALTER BAILEY is a brother, and ELSIE M. PINNEY and MARIE BAILEY sisters, of EMMA O. LESTER, deceased, and had she died intestate petitioners would have been entitled to her entire estate.

2. That petitioners had notice that a certain paper writing bearing date the first day of July, 1965, has been filed in this Court as the last will and testament of said EMMA O. LESTER, deceased.

3. That their interests will be injuriously affected by the allowance of said pretended will, or its admission to probate; that they do hereby contest the probate and the validity of said paper writing purporting to be the last will and testament of EMMA O. LESTER, deceased, and for that purpose allege:

FIRST: That said paper writing bearing the date July 1, 1965, is not the last will and testament of said deceased.

SECOND: That the attesting witnesses to said alleged will did not, nor did any one of them, sign his or her name as a witness to the said alleged will at the request and in the presence of the said EMMA O. LESTER.

THIRD: That the said deceased was not, at the time of the making and subscribing or of the acknowledging by her of said paper writing, of sound mind and memory or in any respect capable of making a will.

FOURTH: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said EMMA O. LESTER by fraud and deceit exercised upon her by one RAYMOND LEON FISHER or by some other person or persons unknown to petitioners.

FIFTH: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said EMMA O. LESTER by the undue influence, duress and coercion exercised upon her by one RAYMOND LEON FISHER or by some other person or persons unknown to petitioners.

4. That petitioners are advised that a period of at least several months will elapse before a determination of the issues to be framed upon the caveat can be had, and petitioners accordingly state that a collector, or collectors, should be appointed to collect, conserve and administer the assets of the estate of the decedent, pending the conclusion of the litigation.

WHEREFORE, the premises considered, petitioners pray:

1. That process may issue from this Court requiring the parties in interest to answer the exigencies of this petition.

2. That said paper writing may be refused probate.

3. That issues may be framed to be tried by a jury to determine the facts with respect to the execution, and the validity, of the alleged will.

4. That a collector or collectors of the estate of the deceased may be appointed to serve under bond until the termination of this caveat proceeding.

5. That petitioners have such other and further relief as to the Court may seem just and proper.

/s/ Walter Bailey

/s/ Elsie M. Pinney

/s/ Marie Bailey

/s/ Joseph J. Malloy  
Attorney for Petitioners

[Notary's jurat, 27 Oct. 1965]

---

[Filed Nov. 2, 1965]

**ANSWER TO PETITION FOR CAVEAT**

J. Benjamin Simmons, the Executor named in the will bearing date the first day of July, 1965, filed in this Court as the last will and testament of Emma O. Lester, Deceased, in answer to the caveat of Walter Bailey, Elsie M. Pinney, and Marie Bailey, says:

1. This respondent admits the allegations of paragraph 1 of said Petition.
2. This respondent admits the allegations of paragraph 2.
3. Answering the allegations of paragraph 3 of said Petition, this respondent states as follows:

First: This respondent denies the allegations that the said paper writing bearing date the first day of July, 1965, is not the last will and testament of Emma O. Lester, Deceased.

Second: This respondent denies the allegations that the attesting witnesses to said will did not sign their names as witnesses thereto at the request and in the presence of the said Emma O. Lester.

Third: This respondent denies the allegation that said decedent was not, at the time of the making and subscribing or of the acknowledging by her of said paper writing, of sound mind and memory or in any way capable of making a will.

Fourth: Upon information and belief, this respondent denies the allegation that the said paper writing purporting to be the last will and testament of said deceased was obtained and the execution thereof procured by fraud and deceit exercised upon her by one Raymond Leon Fisher or some other person or persons unknown to the petitioners.

Fifth: Upon information and belief, this respondent denies the allegation that said paper writing was subscribed and published by said decedent under undue influence, duress and coercion exercised over her by one Raymond Leon Fisher or by some person or persons unknown to petitioners.

Further answering, this respondent, upon information and belief, avers the facts to be that the said paper writing bearing date the first day of July, 1965, is the last will and testament of Emma O. Lester, deceased; that at the time of the execution thereof, the said Emma O. Lester was of sound and disposing mind and capable of executing a valid will, deed, or contract; that at the date of her execution of said will, the decedent declared to the attesting witnesses that said paper writing was the last will and testament of her, the said Emma O. Lester; that all of the attesting witnesses signed their names as witnesses to the said will at the request of the said Emma O. Lester and in her presence, and that the said paper writing was not executed under fraud, coercion, duress, or undue influence of Raymond Leon Fisher or of any other person or persons whatsoever.

Further answering, this respondent says that he is willing that issues may be framed and tried before a jury, as by law provided, in

order that the truth of the allegations of the aforesaid caveat may be determined.

J. Benjamin Simmons

[Notary's jurat, \_\_\_ Nov. 1965]

[Certificate of Service, \_\_\_ Nov. 1965]

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[Filed Nov. 10, 1965]

ORDER FRAMING ISSUES

Upon consideration of the caveat of Walter Bailey, Elsie M. Pinney and Marie Bailey, filed against a certain paper writing bearing date the first day of July, 1965, filed herein, purporting to be the last will and testament of Emma O. Lester, deceased, and of the answer of J. Benjamin Simmons, filed hereto, it is by the Court this 10th day of November, 1965:

ORDERED, That the following issues be and they are hereby framed to be tried before a jury on the 28th day of January, 1966:

One: Was the paper writing dated the first day of July, 1965, purporting to be the last will and testament of Emma O. Lester, deceased, executed and attested in due form, as required by law?

Two: Was the said Emma O. Lester, at the time of the making and subscribing or of the acknowledging by her of the said paper writing, of sound and disposing mind and capable of executing a valid deed or contract?

Three: Was the said paper writing dated the first day of July, 1965, obtained, or the execution thereof procured from the said Emma O. Lester, deceased, by fraud or deceit practiced upon the said Emma O. Lester by Raymond Leon Fisher, or some other unknown person or persons?

Four: Was the said paper writing dated the first day of July, 1965, obtained, or the execution thereof procured from the said Emma O. Lester, deceased, by the undue influence or duress, or coercion of Raymond Leon Fisher, or some other unknown person or persons?

Five: Was the said paper writing filed in this Court and bearing date the first day of July, 1965, the last will and testament of Emma O. Lester, deceased?

/s/ Howard F. Corcoran  
Judge

We Consent:

/s/ Joseph J. Malloy  
Attorney for Caveators

/s/ J. Benjamin Simmons  
Attorney for Caveatee

---

[Filed December 7, 1965]

ORDER AUTHORIZING EMPLOYMENT OF COUNSEL

Upon consideration of the petition of J. Benjamin Simmons, the executor nominated in the paper writing bearing date the first day of July, 1965, filed herein and by him propounded as and for the last will and testament of Emma O. Lester, deceased, for leave to employ counsel, it is by the Court, this 7th day of December, 1965,

ORDERED that said petitioner be and he is hereby authorized to employ a member of the bar of this court to appear herein for petitioner in the proceedings to be had upon the caveat filed to said purported will dated the first day of July, 1965, provided the question of allowance

of counsel fees be deferred until determination of the issues raised by said caveat.

/s/ HOWARD F. CORCORAN  
Judge

Consent:

/s/ JOSEPH J. MALLOY  
Attorney for Caveators

---

[Filed January 28, 1966]

PRAECIPE

the 28th day of January, 1966.

The Clerk of said Court will please enter my appearance as attorney for caveatee.

/s/ RAYMOND L. POSTON, Jr.

---

[Filed January 28, 1966]

**PRETRIAL PROCEEDINGS**

Statement of nature of case: Caveat to a will.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF  
FACTS AND STIPULATE THERETO: Emma O. Lester, of 1625 - S St.,  
E SW, DC, died on Sept. 1, 1965, at the age of 81. She left a brother,  
Walter Bailey of Md and two sisters, Elsi Pinney and Marie Bailey of  
Md and DC respectfully, and no other next of kin. An instrument en-  
titled Last Will and Testament of Emma O. Lester was filed in this  
Court on Sept. 16, 1965, accompanied with a petition for probate and  
letters testamentary.

\* \* \*

Four: Was the said paper writing dated the first day of July, 1965, obtained, or the execution thereof procured from the said Emma O. Lester, deceased, by the undue influence or duress, or coercion of Raymond Leon Fisher, or some other unknown person or persons?

Five: Was the said paper writing filed in this Court and bearing date the first day of July, 1965, the last will and testament of Emma O. Lester, deceased?

/s/ Howard F. Corcoran  
Judge

We Consent:

/s/ Joseph J. Malloy  
Attorney for Caveators

/s/ J. Benjamin Simmons  
Attorney for Caveatee

---

[Filed December 7, 1965]

ORDER AUTHORIZING EMPLOYMENT OF COUNSEL

Upon consideration of the petition of J. Benjamin Simmons, the executor nominated in the paper writing bearing date the first day of July, 1965, filed herein and by him propounded as and for the last will and testament of Emma O. Lester, deceased, for leave to employ counsel, it is by the Court, this 7th day of December, 1965,

ORDERED that said petitioner be and he is hereby authorized to employ a member of the bar of this court to appear herein for petitioner in the proceedings to be had upon the caveat filed to said purported will dated the first day of July, 1965, provided the question of allowance

of counsel fees be deferred until determination of the issues raised by said caveat.

/s/ HOWARD F. CORCORAN  
Judge

Consent:

/s/ JOSEPH J. MALLOY  
Attorney for Caveators

---

[Filed January 28, 1966]

**PRAECIPE**

the 28th day of January, 1966.

The Clerk of said Court will please enter my appearance as attorney for caveatee.

/s/ RAYMOND L. POSTON, Jr.

---

[Filed January 28, 1966]

**PRETRIAL PROCEEDINGS**

Statement of nature of case: Caveat to a will.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF  
FACTS AND STIPULATE THERETO: Emma O. Lester, of 1625 - S St.,  
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Walter Bailey of Md and two sisters, Elsi Pinney and Marie Bailey of  
Md and DC respectfully, and no other next of kin. An instrument en-  
titled Last Will and Testament of Emma O. Lester was filed in this  
Court on Sept. 16, 1965, accompanied with a petition for probate and  
letters testamentary.

\* \* \*

**CAVEATOR CLAIMS:**

(1) That the writing purporting to be the last will and testament of the decedent was not witnesses in the presence of decedent by subscribing witnesses George and Nancy Ferriuolo.

(2) That at the time of making and subscribing or acknowledging the paper writings Emma Lester was not of sound and disposing mind and was not capable of executing a valid will, deed or contract because she was 81 years of age, was in poor mental and physical health, was suffering from heart disease, eye trouble which prevented her from seeing people two feet from her and she suffered from generalized arteriosclerosis and was xxx therefore not of sound mind.

(3) That the paper writing or its execution was obtained or procured from Emma Lester by undue influence, duress, coercion, fraud or deceit upon the decedent by Raymond Leon Fisher because the purported will was typed on a form procured by him at Woodhouse Stationery Co; Fisher selected his daughter and son-in-law, the Ferriuolos, to act as witnesses; Fisher was present at the time of and saw to the execution of the purported will; that he immediately took it to his home in Va where he kept it until the death of the decedent; that although Fisher had been on friendly terms with the caveators for many years, he concealed from them the existence of the purported will until after the death of Emma Lester.

(4) On the basis of all of the foregoing the caveators assert that the document presented for probate is not the last will and testament of Emma O. Lester.

(5) Caveators further assert that Fisher was paid during the lifetime of Emma O. Lester for any and all services rendered by him for her.

\* \* \*

**CAVEATEES DENY** the allegations made by the caveators; assert that although the will is of a home-made nature, it was properly exe-

cuted by the testatrix and witnesses by two competent witnesses and contains all of the legal requirements of a good and valid will.

They further assert that the testatrix was a self-xxx reliant, hard-working woman. She was a rugged individualist who had accumulated a modest estate through shrewd, business-like investments and frugality. Although she was eighty-one (81) years of age, she maintained her home and capably carried on her various business transactions up to the time of her sudden illness on or about August 31, 1965.

For the period of approx twenty-five (25) years prior to her death, Raymond Leon Fisher, residuary legatee under her will, was her main source of assistance in matters concerning xxxx transportation, repairs, grocery shopping, xxxx household chores, errands, business affairs and numerous other tasks. She was fond of him and he was fond of her. His assistance to her was out of xxx friendship and not for compensation. Over the years she became less friendly with the Caveators, her brothers and sisters, especially Marie xxxxxxx Bailey, from whom she was completely alienated. She justifiably believed that her brothers and sisters were not sympathetic with her problems and were unwilling to take the time and trouble to render her any real assistance.

On July 1, 1965, the date on which she made her last will and testament, the said Raymond Leon Fisher, was undoubtedly the person she believed to be her main benefactor over the years and the one most deserving the xxxx bulk of her estate. Her main interest was not in the Caveators nor even in the said, Raymond Leon Fisher, but actually in her dog, for whom she was quite anxious to insure a good home. She knew that the said xxxxxxx Raymond Leon Fisher would take care of her dog in the same fashion that he and she had provided for it over the years.

Accordingly, the last will and testament of the said testatrix, made July 1, 1965, was the natural product evolving from the existing facts and circumstances during the several years prior to her death. It is the position of the Caveatee that the paper writing dated July 1, 1965,

xxx purporting to be the last will and testament of the said Emma O. Lester, deceased, was executed and attested to in due form as required by law and was actually her last will and testament. That the said Emma O. Lester at the time of the execution of said will was of sound and disposing mind and capable of executing a valid deed or contract. That the execution of said will was not procured from the said Emma O. Lester, deceased, by fraud, deceit, undue influence, duress or coercion by the said Raymond Leon Fisher or any unknown person or persons.

WHEREFORE, the Caveatee prays that the petition for caveat be dismissed and denied.

#### STIPULATIONS

The parties agree to file with the Clerk of the court and to mutually exchange, on or before Feb. 25, 1966, a list of the names and addresses of any witnesses known to them including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

The following may be admitted in evidence without formal proof subject to all legal objections: death certificate initialed by Examiner; hospital records re decedent's ~~sudden illness~~;

The Examiner has requested counsel for the parties to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

Pretrial Examiner

Trial Examiner:

Joseph J. Malloy, Esq. for Caveators

Raymond A. Poston, Jr., Esq. for Caveatee

---

[Filed January 28, 1966]

ORDER FIXING NEW DATE FOR TRIAL OF ISSUES

This cause coming on to be heard, it is by the Court this 28th day of January 1966,

ORDERED, That the issues heretofore framed in this cause and set for trial on the 28th day of January 1966, be and the same is hereby continued and now set for trial before a jury on the 14th day of March, 1966.

/s/ MATTHEW F. MCGUIRE  
Chief Judge

We consent:

/s/ JOSEPH J. MALLOY  
Attorney for Caveators

/s/ RAYMOND L. POSTON, Jr.  
Attorney for Caveatee

---

[Filed March 23, 1966]

BOOK 340, PAGE 416

Sixth Minute Entry

Wednesday, March 23, 1966  
Civil Division No. 1  
Judge Alexander Holtzoff, Presiding

In Re: Estate of Emma O. Lester, Deceased.

(Caveatee) Plaintiff,

vs.

(Caveator) Defendant.

Now come here again the parties aforesaid in manner aforesaid, with the same jury and alternate jurors that was respited yesterday; whereupon the trial was resumed; alternate jurors discharged, where-

upon issues Numbers 2 and 4 (renumbered 1 and 2 for the jury) given to the jury for deliberation, and the jury, upon their oath say to said issues:

BOOK 340, PAGE 417

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Questions for the Jury

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Q. No. 1      Was Emma O. Lester at the time of the execution of her alleged will, dated July 1, 1965, of sound and disposing mind and capable of executing a valid deed or contract? (Answer "Yes" or "No".)

A.      Yes.

Q. No. 2      Was the execution of the alleged will of Emma O. Lester, dated July 1, 1965, procured by the undue influence of Raymond L. Fisher, or some other person or persons? (Answer "yes" or "no".)

A.      Yes.

/s/ CHARLES M. SIMS  
Foreman

BOOK 340, PAGE 418

whereupon, the Court directs that the word "No" be entered as the answer to Issue Number 5.

Docket Entries

1966      Issues Nos. 2 and 4 answered "Yes". Issue No. 5 answer "No",  
Mar. 23    by direction of the Court.

Verdict setting aside will.

Proceedings before Civil Division No. One of the United States District Court for the District of Columbia, holding a special term

as a Probate Court for the trial of Will Contests. Judge Alexander Holtzoff, Presiding.

/s/ THEODORE COGSWELL  
Register of Wills for the District of Columbia, Clerk of the Probate Court

---

[Filed March 29, 1966]

**ORDER DENYING PROBATE**

It appearing to the Court that the issues framed in the above entitled cause were duly submitted to the jury for determination, and that said jury answered that the execution of the alleged will of Emma O. Lester, dated July 1, 1965, was procured by the undue influence of Raymond Leon Fisher, or some other person or persons, and issue "Five", to wit "Was the said paper writing filed in this Court and bearing date the first day of July, 1965, the last will and testament of Emma O. Lester, deceased?", was answered in the negative;

That the jury answered "Yes" to issue "Two", and issues "One", "Three", and that portion of issue "Four", relating to duress or coercion, were withdrawn from the consideration of the jury:

It is by the Court this 29 day of Mar., 1966:

ADJUDGED, ORDERED and DECREED, that the prayers of the petition of J. Benjamin Simmons for probate and record of the paper writing filed in this cause, purporting to be the last will and testament of the said Emma O. Lester, deceased, be and is hereby denied; that the paper writing dated the first day of July, 1965, purporting to be the last will and testament of Emma O. Lester, deceased, be and the same is hereby denied probate and record as such will and testament, and it is further:

ADJUDGED, ORDERED and DECREED, that the said Emma O. Lester, deceased, died intestate.

/s/ Oliver Gasch, Judge

[Acknowledgment of receipt of copy  
of order denying probate, 3/24/66, by Raymond L. Poston, Jr., Esq.]

[ Memorandum attached to Order Denying Probate]

OFFICE OF REGISTER OF WILLS  
Clerk of the Probate Court  
Washington, D.C.

March 29, 1966

No. 115,114

**Estate of** **Emma O. Lester** **Deceased**

Order denying probate to paper-writing dated July 1, 1965, purported to be last will and testament of this decedent and decreeing that said Emma O. Lester, deceased, died intestate.

This order is in accordance with verdict of the jury on March 23, 1966, setting aside said will.

Approval recommended.

/s/ Theodore Cogswell  
Register of Wills

[Filed March 31, 1966]

## ORDER GRANTING ADMINISTRATION

Upon consideration of the petition of Walter Bailey, filed herein on the 30th day of March 1966, for letters of administration, and it appearing to the Court that, by Order passed herein March 29, 1966, Emma O. Lester, deceased, departed this life intestate, it is by the Court this 31st day of March 1966:

ADJUDGED, ORDERED and DECREED that Walter Bailey be and he hereby is appointed administrator of the Estate of Emma O. Lester, deceased, and that letters of administration on said estate issue to Walter Bailey upon his filing an undertaking with security approved by the Court in the sum of Twenty-five Hundred dollars, conditioned for the faithful performance of the trust in him reposed, provided he files a power of attorney in compliance with Title 20, Section 365 of the Code of Laws of the District of Columbia.

/s/ OLIVER GASCH  
Judge

[Filed April 5, 1966]

**MOTION FOR JUDGMENT N. O. V. OR IN THE  
ALTERNATIVE FOR A NEW TRIAL**

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Comes now the caveatee, through counsel and respectfully moves the court under the Federal Rules of Civil Procedure for a judgment non obstante veredicto or in the alternative, for a new trial and for grounds of said motion states as follows:

1. The court erred in failing to grant a directed verdict in favor of the caveatee on the issue of undue influence.
2. The verdict was contrary to the weight of the evidence.
3. The court erred in failing to instruct the jury that the court had found as a matter of law that there was due execution of the will.
4. The court erred in commenting on the evidence that Raymond Leon Fisher procured the will form, arranged for the witnesses and took custody of the will without counterbalancing these comments with comments on the testimony of Mr. Fisher explaining that the will form was procured at the request of the testatrix about two (2) months prior to the execution of the will; that the subscribing witnesses, Mr. Fisher's daughter and son-in-law, were present at her request and only after an attempt had been made to have other subscribing witnesses present; that Mr. Fisher took custody of the will at her request and because she said she was afraid it might be destroyed by her relatives if left in the house.
5. That the court erred in commenting on the evidence that Raymond Leon Fisher did not disclose to the caveators the contents of the will without going further and explaining that it would be improper to make such disclosure even in the absence of an express request by the testatrix not to disclose said information.
5. The court erred in overemphasizing the fact that no evidence

was introduced showing who typed the will and categorized this situation as a "mystery."

Raymond L. Poston, Jr.  
Attorney for Caveatee

[Certificate of Mailing, April, 1966]

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[Filed April 11, 1966]

**OBJECTIONS TO MOTION FOR JUDGMENT N. O. V.**  
**OR IN ALTERNATIVE FOR NEW TRIAL**

Comes now the caveators, by their attorney, and object to the motion of caveatee for a judgment non obstante veredicto, or in the alternative for a new trial, and for grounds of said objection state the following:

1. The Court did not err in failing to grant a directed verdict in favor of caveatee on the issue of undue influence.
2. The verdict was not contrary to the weight of the evidence, but was in accordance with the evidence.
3. The Court did not err in instruction with reference to due execution of the alleged will, as the issue was withdrawn and the Court properly gave instructions to the jury.
4. The Court did not err in commenting on the evidence concerning the testimony of Raymond Leon Fisher, nor on the fact no evidence was introduced showing who typed the alleged will, nor in admitting or excluding evidence, and the Court clearly instructed that the Jury was sole judges of the facts.
5. The case was fully and fairly tried, and free from error, and the decision of the jury was just and proper.
6. There are no grounds upon which a motion for judgment notwithstanding the verdict, or a new trial, could be based, and the motion

for judgment N.O.V. or in the alternative for a new trial should be overruled and denied.

Wherefore, caveators object to the motions and pray that the Motion to set aside Order appointing Water Bailey as administrator, and request for the appointment of a collector, together with the Motion for judgment N.O.V., or in the alternative for a new trial, all be denied.

/s/ Joseph J. Malloy  
Attorney for Caveators

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[Filed May 5, 1966]

**ORDER OVERRULING MOTIONS FOR JUDGMENT  
N.O.V. and FOR A NEW TRIAL DENYING MOTIONS  
TO SET ASIDE ORDER APPOINTING ADMINIS-  
TRATOR, and MOTION FOR APPOINTMENT OF A COL-  
LECTOR PENDING CAVEATEE APPEAL.**

This cause came on to be heard upon the Motions of Caveatee, J. Benjamin Simmons, for a judgment non obstante veredicto, or in the alternative for a new trial, and to set aside the Order appointing Walter Bailey, brother of decedent, administrator, and for appointment of a collector pending appeal herein, and the Court having considered said motions of Caveatee, and the answer and objections of Caveators thereto, and after argument of counsel thereon, it is by the Court this 5th day of May, 1966:

ORDERED and ADJUDGED that the motions of Caveatee for Judgment N.O.V., and for a new trial be and the same are hereby overruled and it is further

ORDERED that the motions to set aside the Probate Court Order appointing Walter Bailey administrator, and the motion for an order appointing collector pending appeal, be and the same are hereby denied, provided the administrator give an additional general bond of Seventeen

Thousand Five Hundred Dollars (\$17,500.00), so as to make the total amount of undertakings of administrator \$20,000.00, and to withhold distribution of the estate pending an appeal.

/s/ ALEXANDER HOLTZOFF  
Judge

/s/ RAYMOND L. POSTON, Jr.  
Attorney for Caveatee

/s/ JOSEPH J. MALLOY  
Attorney for Caveators

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[ Memoranda attached to Order Overruling, etc., from Theodore Cogswell,  
Register of Wills, dated May 5, 1966]

MEMORANDUM FOR JUDGE HOLTZOFF

The attached order overrules Motion for Judgment N.O.V., or in the alternative, for a new trial and also overruled Motion to set aside the order of the Court appointing the Administrator and for the appointment of a Collector pending the appeal herein.

The order further requires the Administrator to give an additional general bond of \$17,500, which with the present bond of \$2,500 will make a total of \$20,000 which is sufficient to cover the entire estate.

The order further directs the withholding of any distribution of the estate pending an appeal.

Said order is presented by Joseph J. Malloy, attorney for the caveators and is marked "Seen" by Raymond L. Poston, Jr., attorney for the caveatee.

Approval recommended.

\* \* \*

MEMORANDUM FOR JUDGE HOLTZOFF

Joseph J. Malloy, Esquire, counsel for the caveators, presented this order through this office stating that the Court had given him direction to do so.

This office would otherwise have sent it through Miss Hummer's office.

Respectfully submitted,

\* \* \*

*Mr. Cogswell: I just assumed as this case relate (sic) to probate, the order went through your office. I just like to follow the usual routine.*

AH

22(i)

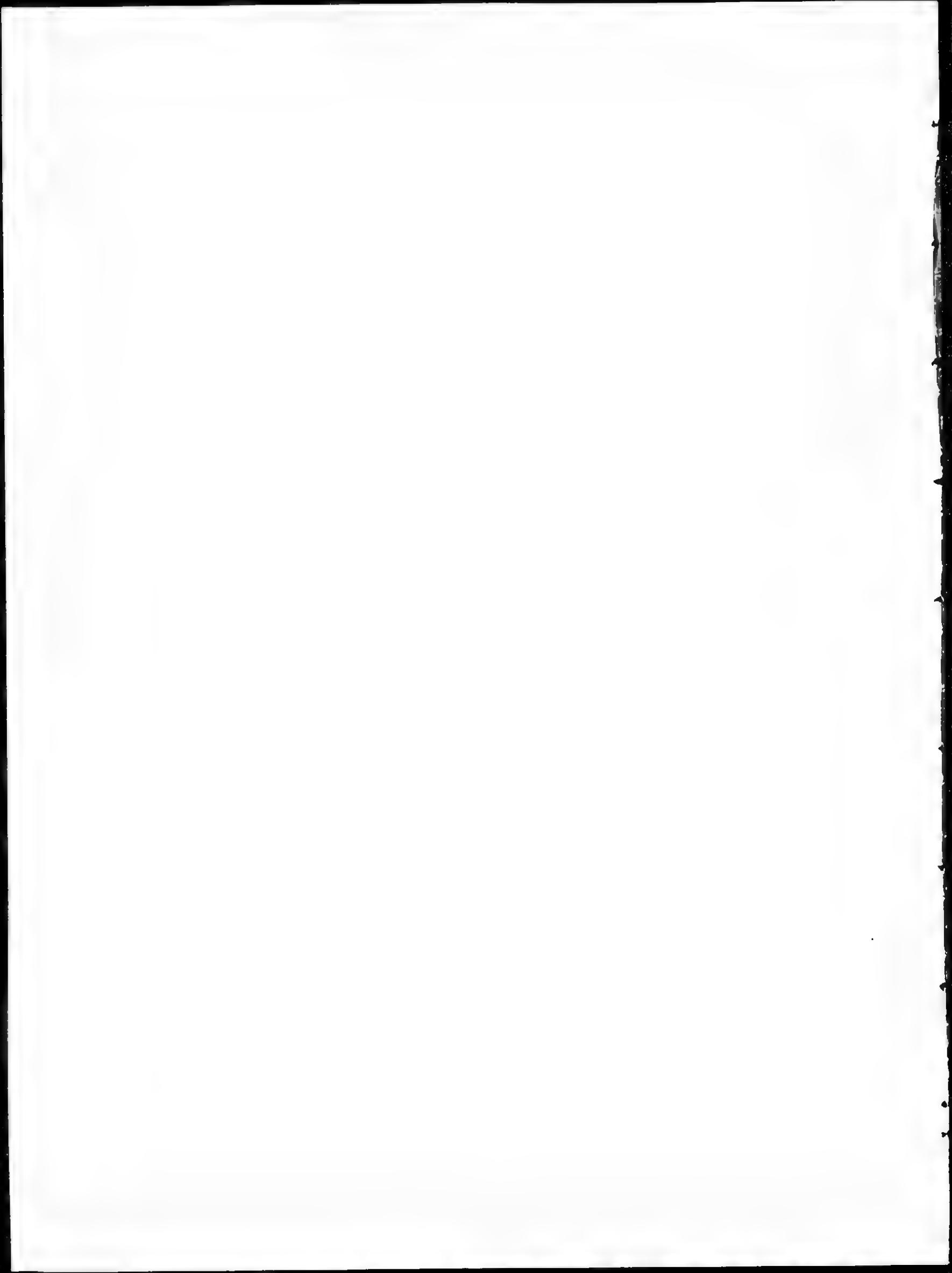
[Filed May 26, 1966]

**NOTICE OF APPEAL**

Notice is hereby given this 26th day of May, 1966, that J. Benjamin Simmons, Caveatee hereby appeals to the United States Court of Appeals for the District of Columbia from the Order Denying Probate of this Court entered on the 29th day of March, 1966 in favor of Walter Bailey, Elsie M. Penney, and Marie Bailey, Caveators against said Caveatee.

/s/ Raymond L. Poston, Jr.  
Attorney for Caveatee

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DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC HEALTH  
CERTIFICATE OF DEATH

5 SE. 3 AM 10 00

Birth No.

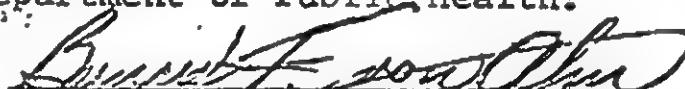
File No. 65 8775

1. NAME OF DECEASED (Type or Print)			First	Middle	Last	2a. DATE OF DEATH	Month	Day	Year	2b. Hour of Death					
EMMA O. LESTER						8/1/1965	1ST 1965	7:11 P.M.							
3. SEX	4. COLOR OR RACE	5. Never Married, Married, Widowed, Divorced: Specify				6. DATE OF BIRTH	7. AGE (In years last birthday)	8. If Under 1 Yr. Months	9. If Under 24 Hrs. Hours	10. If Under 1 Min.					
F	White	Never Married				6/21/1884	57								
8. PLACE OF DEATH IN Washington, D. C. NAME OF HOSPITAL, NURSING HOME OR OTHER INSTITUTION (If not in institution, give street address)						9. USUAL RESIDENCE (Where deceased lived. If institution, residence before admission)	a. STATE D.C.			b. COUNTY					
Columbia Hospital						11. Washington, D. C.				12. INSIDE CITY LIMITS (SPECIFY YES OR NO) YES					
						d. STREET ADDRESS				13. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired)	14. KIND OF BUSINESS OR INDUSTRY	15. BIRTHPLACE (State or foreign country)	16. CITIZEN OF WHAT COUNTRY?		
						1525 - A. ST. S.						17. FATHER'S NAME	18. MOTHER'S MAIDEN NAME	19. NAME OF SURVIVING SPOUSE	
17. Ever in U. S. Armed Forces?			18. SOCIAL SECURITY NO.			19a. INFORMANT RELATIONSHIP TO DECEASED	19b. ADDRESS	Street	City	State					
20. CAUSE OF DEATH: (Enter only one cause per line for (a), (b), and (c). PART I. DEATH WAS CAUSED BY: IMMEDIATE CAUSE (a) Cerebral Vascular - Accident												Interval Between Onset and Death: 48 Hours			
Conditions, if any, which gave rise to above cause (a), stat- ing the underlying cause			DUE TO (b) ARTERIOSCLEROSIS (GENERALIZED)												
DUE TO (c)															
PART II. OTHER SIGNIFICANT CONDITIONS: contributing to death but not related to the terminal disease condition given in part I(a) A.S.H.D. Congestive						20a. DATE OF OPERATION	20b. CONDITION FOR WHICH OPERATION WAS PERFORMED	20c. AUTOPSY?	20d. YES OR NO	20e. If Yes, Were Findings Considered in Determining Cause of Death?					
IF OPERATION WAS PERFORMED COMPLETE ITEMS 20a and 20b															
21a. Specify if accident, suicide, homicide, or manner undetermined			21b. HOUR AND DATE OF INJURY: Month, Day, Year M			21c. DESCRIBE HOW INJURY OCCURRED (Enter nature of injury in Part I or Part II)									
21d. INJURY AT WORK: (Specify Yes or No)			21e. PLACE OF INJURY: (At Home, Farm, Factory, Street or Office Building, Etc.)			21f. LOCATION	CITY	COUNTY	STATE						
22. I certify that (I) (this hospital) attended the deceased from 5-3-65 to 8-1-65, that (I) (we) last saw the deceased alive on 5-3-65, and that death occurred from the causes and on the date and hour stated above.															
22a. SIGNATURE			ATTENDING PHYS.			22b. MEDICAL DIRECTOR <input type="checkbox"/>	STAFF PHYS. <input type="checkbox"/>	22c. DATE SIGNED 9-2-65							
22d. PHYSICIAN'S NAME (Type)			L.D. SUMMERTFIELD, M.D.			22e. ADDRESS 1400 31st Street N.E. D.C.									
23a. BURIAL CREMATION REMOVAL <input type="checkbox"/>			23b. DATE 8/1/65	23c. NAME OF CEMETERY OR CREMATORIAL			23d. LOCATION	(City, town, or county)			(State)				
24. FUNERAL HOME ADDRESS			VFW			24e. UNDERTAKER'S SIGNATURE	24f. UNDERTAKER'S REGISTRATION NUMBER	758							

REMARKS:

Date Issued SEP 8 - 1965

NOT VALID WITHOUT RAISED SEAL

THIS IS TO CERTIFY that the above is a true and correct reproduction  
of the original certificate filed with the Vital Statistics office  
of the District of Columbia Department of Public Health.

Bernard F. von Ahn, Chief  
Vital Statistics Unit

TRANSCRIPT OF PROCEEDINGS  
(Washington, D. C. March 16, 1966)

[3] (The voir dire examination and selection of the jury and the opening statements were not transcribed.)

THE COURT: Mr. Poston, you may proceed.

MR. POSTON: I Call George Ferraiuolo. Whereupon GEORGE FERRAIUOLO was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. George Ferraiuolo.

THE COURT: Now, Mr. Ferraiuolo, some of the jurors who have to hear you are quite a distance away from where you are seated, so speak slowly, loudly, and very distinctly like I am doing.

Now how do you spell your name?

THE WITNESS: F-e-r-r-a-i-u-o-l-o. I think you are going to have to excuse my English. I have been in this country only ten years. I said my English is not so good, Your Honor.

[4] THE COURT: That is all right.

BY MR. POSTON:

Q. What is your address, Mr. Ferraiuolo?

THE COURT: Just speak slowly and distinctly, and we will understand everything you say very well.

THE WITNESS: 1643 Colonial Terrace, Arlington, Virginia.

BY MR. POSTON:

Q. Where are you employed? A. I am employed now at Montgomery Ward, Seven Corners.

Q. What is your age? A. 30.

A. Did you know the deceased, Emma O. Lester? A. Yes.

Q. How long did you know her prior to her death? A. Oh, about ten years.

Q. Did there come a time when you witnessed a will for her? A. Yes.

Q. When was this? A. July 1.

Q. What year? A. '65.

Q. How did you become—how did you receive knowledge [5] that you were to witness her will? A. I was at work and my wife called me and she said that her father called her and that Mrs. Lester wanted to see us on some business.

Q. What did you do? A. Well, I got off of work, went to pick up my wife and went up there.

THE COURT: Went where?

THE WITNESS: Mrs. Lester's home.

BY MR. POSTON:

Q. Where was this? A. Where?

Q. Yes. A. It was in 1525 S Street, Southeast.

Q. Approximately what time did you get there? A. Oh, I will say between one and two.

Q. In the afternoon? A. Yes, sir.

Q. What did you do when you got there? A. Oh, Mr. Fisher opened the door for us.

Q. Is there any relationship between you and Mr. Fisher? A. Yes, he is my father-in-law.

Q. What happened after Mr. Fisher opened the door? A. Oh, we walked in the living room and we went in the [6] den—I imagine that is what you call it—and Mrs. Lester was there.

Q. What did she say at that time? A. Oh, after we were all talking, she asked us, my wife and I, if we wanted—I mean, witness a will.

Q. Then what happened after that? A. Well, we did sign a will, of course, and she offered us a cup of tea.

Q. Did she execute this will in your presence at that time? A. Yes.

THE COURT: Well, the word "execute" is a legal term.

BY MR. POSTON:

Q. Did she sign the will in your presence at that time? A. Yes.  
Q. Did you sign the will as a witness in her presence at that time?

A. Yes.

Q. Did anyone else sign the will in her presence at that time? A. My wife.

Q. What is her name? A. Nancy.

[7] MR. POSTON: Your Honor, I would like to have the will.

BY MR. POSTON:

Q. Now, at the time of the execution of this will, what did you observe relative to her mental condition? A. Nothing. Just like normal to me.

Q. Please repeat your answer. A. Just normal like any other person.

Q. How did her--how was her conversation? A. Fine.

Q. Did she speak sensibly? A. Oh, yes. I wish I was like this at 80.

Q. In your opinion was she at that time of sound or unsound mind? A. I would say she was in very good--very good in mind.

Q. She was of sound mind? A. Yes, sir.

Q. Now I hand you this document. Can you identify it? A. Yes.

Q. What is it? A. It is a will with my signature.

Q. Is this the will that she signed in your presence [8] on July 1, 1965? A. Yes, it was.

Q. Now note on here a signature of Emma O. Lester. A. That's right.

Q. Is that her signature? A. It is.

Q. That is the signature she put on there in your presence on July 1, 1965? A. Yes.

Q. I note on here George Ferraiuolo. Is that your signature. A. Yes, it is.

Q. Is that the signature you put on there at the same time she executed the will? A. Yes.

Q. I note on there the signature of Nancy Ferraiuolo. Is that your wife's signature? A. Yes, it is.

THE COURT: Let me see the will.

BY MR. POSTON:

Q. Did she, the testatrix, Mrs. Lester, sign the will in the presence of both you and your wife? A. Yes.

Q. Did you and your wife both sign the will in her [9] presence? A. Yes, I signed—

Q. In the presence of Mrs. Lester? A. Yes. I signed it first, and then my wife.

MR. POSTON: I have no further questions of this witness, Your Honor.

THE COURT: Any cross-examination, Mr. Malloy?

MR. MALLOY: Yes, Your Honor. May I see the will?

#### CROSS-EXAMINATION

BY MR. MALLOY:

Q. You have stated that the address was 1525 S Street, Southeast? A. Yes.

Q. How long had Mrs. Lester lived there? A. I would say about—I think it was—she moved in '65.

Q. Do you know the month? A. No, I am not—no, no, I don't. I don't know exact—I mean, date. No, I don't.

Q. Mrs. Lester had difficulty in seeing, did she not? A. Not that I know of.

Q. She did not have any difficulty in seeing? A. Not that I know of. [10] Q. And there wasn't any question that you were at 1525 S Street, Southeast? A. Yes.

Q. Who typed this will? A. I don't know.

Q. You don't know who typed it? A. No.

Q. At the time you signed it, what does this—the first line there state? This. (Indicating). A. Emma Lester—

Q. Read the first line. Read it as it is on there. A. I Emma O. Lester of 1625 S Street, Southeast.

Q. Why would she say 1625 S. Street, Southeast, if she could see, when she lived at 1525 S Street, Southeast? A. I don't know.

Q. What does this say here? Can you read that? A. Mr. Fisher knows where my deeds, passbooks and personal papers are located and he has been instructed to deliver them and my will to Mr. Benjamin Simmons in case of my death.

Q. Now, did you—you have here—this is where you signed? A. (Indicated)

Q. Now, does this say Benjamin Simmons again here? A. Yes.

[11] Q. Did you know Mr. Simmons? A. No, I didn't.

Q. Mr. Simmons didn't draw this will, did he? A. No, he didn't.

Q. The line here where it says—read those two lines at the end right before the signature. A. The above-named—

Q. No, here. A. Signed, Sealed, Published, and Declared by Emma O. Lester.

Q. Go on. A. The above-named testator.

Q. Testator. A. Testator.

Q. Wouldn't she be the testatrix? A. I don't know exactly what you mean by that.

Q. This says the above-named testator. A. I am sorry. This is a new word for me.

Q. Did you know that Mr. Simmons' name was J. Benjamin Simmons? A. I don't know Mr. Simmons at all until this came up.

Q. You say your father-in-law called Nancy. She is your wife? A. Yes.

[12] Q. She is the daughter of Mr. Raymond Leon Fisher? A. Yes.

Q. Who is mentioned in this will? A. Yes.

Q. Did Mr. Fisher call you or did he call his daughter? A. Well, I was at work. He called my daughter—my wife at home and my wife called me.

Q. Your wife called you? A. That's right.

Q. And said that Mr. Fisher wanted you to be a witness over at the will? A. No, no, no. That is not what he said. What he said was—

Q. You didn't talk to Mr. Fisher, did you? A. No, I didn't. What he said was that Mrs. Lester wanted to see us and asked us to—I mean, do some business for her.

Q. Now, you weren't working at Montgomery Ward at that time, were you? A. No, I wasn't.

Q. Where were you working then? A. Marlo's Furniture.

Q. Where? A. Marlo's Furniture.

[13] Q. Marlo's Furniture. Is that on Seventh Street? A. Yes. The store is on Seventh Street. I was working at the warehouse, West Virginia Avenue, Northeast.

Q. What was the address? On West Virginia Avenue? A. Where was the address?

Q. Yes, where you were. A. 2500 West Virginia Avenue.

Q. Northeast? A. That's right.

Q. Where was your daughter when the father called her? A. Where was my daughter?

Q. Your wife. Pardon me. A. My wife? At home.

Q. Where is your home? A. 1643 Colonial Terrace.

Q. Where? A. Arlington.

Q. Did you see Mrs. Lester again after this incident? A. No, I didn't.

Q. Did you ever visit Deale Beach? A. Yes.

Q. And you still say that Mrs. Lester could see well? A. Yes.

Q. Well— [14] A. Excuse me. I don't recall seeing her have any problem, or difficulties when I saw her.

Q. She didn't make any comment about this, saying, I Emma O. Lester of 1625 S Street, Southeast? A. No.

Q. Although she lived at 1525? A. Right.

Q. She didn't say anything about it? A. No.

Q. And she didn't say anything about the—saying deliver the will to Mr. Benjamin Simmons in case of my death? A. No.

Q. When his name is J. Benjamin Simmons? A. No.

Q. Was this—did you remember reading it or do you know what was in it at that time? A. No, I did not know.

Q. You don't know whether that J was there at the time it was signed or not? A. No. The only thing I know about it is that she said to me and my wife, say, "Will you witness a will?". I did not ask any question.

Q. So that you don't know whether that "J" was inserted then or after? [15] A. I don't know nothing about it.

Q. Okay.

MR. MALLOY: That's all, Your Honor.

THE COURT: Any redirect examination?

MR. POSTON: No redirect.

THE COURT: You may step down.

(Whereupon the witness left the stand.)

MR. POSTON: I call Nancy Ferraiuolo to the stand.

Whereupon NANCY FERRAIUOLO was called as a witness, and having been duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MR. POSTON:

Q. Please state your name and address. A. My name is Nancy ferraiuolo, 1643 Colonial Terrace, Arlington, Virginia.

Q. What is your age? A. I am 27.

Q. Where do you work? A. I work for the Government. I work for the United States Government Printing Office.

THE COURT: Mrs. Ferraiuolo, some of the jurors who [16] have to hear your testimony are quite a distance away from where you are seated, so speak distinctly, slowly and loudly, the way I do, and I think it would help you if you would use the microphone.

THE WITNESS: All right.

THE COURT: Get close to the microphone.

BY MR. POSTON:

Q. Did you know the deceased, Emma O. Lester? A. Yes, I did.

Q. For how many years did you know her prior to her death. A. Since I was an infant.

THE COURT: What was your answer?

THE WITNESS: Since I was an infant.

THE COURT: Oh.

BY MR. POSTON:

Q. Did there come a time when you witnessed a will for her? A. Yes, I did.

Q. Where did this take place? A. It took place at 1525 S Street, Southeast.

Q. Now when did you arrive there on that day? A. We arrived about one, between one and two in the afternoon.

[17] Q. Who was there when you got there? A. Mr. Fisher and Mrs. Lester.

Q. Who is Mr. Fisher? A. Mr. Fisher is my father.

Q. Who opened the door? A. My father opened the door, Mr. Fisher.

Q. Where was Mrs. Lester at that time? A. Mrs. Lester was in the middle room. You have a living room and a middle room and then a porch which is used as a dinette.

Q. What happened after you came into the house? A. My father and — we went into the middle room where she was seated.

Q. What happened at that time? A. My father, he took the dog out of the room because he kept jumping up.

THE COURT: Well, do not go so fast. We have to follow you and the reporter has to take down your answer. Would you mind repeating your answer.

THE WITNESS: Yes, my father, he took us in and then he took the dog out of the room because he kept jumping up and he took him back into the living room.

BY MR. POSTON:

Q. After your father took the dog out of the room, who were in the room at that time? A. My husband, myself and Mrs. Lester.

Q. Did you have a conversation with Mrs. Lester at that time? A. Yes, we did.

Q. What did she say at that time? A. Well, she said that the reason she had us come over was because she would like us to witness her will.

Q. Did she have her will there at that time? A. Yes, she did.

Q. Did she sign this will at that time? A. Yes, she did.

Q. Did you sign as a witness at that time? A. Yes, I did.

Q. Did your husband sign as a witness at that time? A. Yes.

Q. Did she sign and witness in your presence and in the presence of your husband? A. Yes, she did.

Q. Did you and your husband sign as witnesses in the presence of each other and in the presence of Mrs. Lester? A. Yes, we did.

Q. What did you observe about Mrs. Lester with regard to her mental condition at that time? [19] A. Well, she seemed the same as she always did. She was in pretty good spirits that day and otherwise she was just as she always was.

Q. Well, how is that? A. Completely wonderful really for a woman her age. She was very—she talked right along and we had a nice conversation.

Q. Did she say anything that didn't make sense to you? A. No, she didn't.

Q. Did she ramble in her conversation? A. No, she didn't.

Q. Did she appear in every respect mentally alert? A. Yes, she did.

Q. In your opinion at that time was she of sound or unsound mind?

A. She was of sound mind.

Q. May I have the will. Now, I show you this document and ask if you can identify it.

Q. Yes, this is the will we signed.

Q. This was on July 1, 1965? A. Yes, this was.

Q. Now, I point to her signature, Emma O. Lester. Is that the signature that she made on this document— A. Yes.

[20] Q.—on July 1, 1965? A. Yes.

Q. I point to the signature of George Ferraiuolo. Is that the signature that your husband made on this document on July 1, 1965? A. Yes, this is.

Q. I point to the signature of Nancy Ferraiuolo, and ask you if this is the signature that you put on this document on July 1, 1965. A. Yes, it is.

MR. POSTON: Now, Your Honor, I offer this will into evidence at this time.

THE COURT: Let it be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1.

(Will marked as Plaintiff's Exhibit No. 1 and received in evidence.)

BY MR. POSTON:

Q. Now, Mrs. Ferraiuolo, from your observations on July 1, 1965, was Mrs. Lester having any difficulty seeing? A. No, she wasn't.

MR. POSTON: No further questions of this witness.

THE COURT: Mr. Malloy.

#### CROSS-EXAMINATION

BY MR. MALLOY:

[21] Q. You had seen Mrs. Lester before, had you not? A. Yes, I have.

Q. You say that she didn't have trouble seeing? A. No, she didn't.

Q. I ask you to read this first line. A. Emma O. Lester.

Q. All the first line. A. Emma O. Lester, 1625 S Street, Southeast.

Q. Now, if she could see why would she put 1625 S Street, Southeast, when you were at 1525 S Street, Southeast, were you not? A. I think so, yes.

THE COURT: Speak up.

THE WITNESS: Yes.

BY MR. MALLOY:

Q. Were you not at 1525 S Street? A. I may be mistaken as to the number. I am not sure.

Q. Then you aren't sure—

THE COURT: Get closer to the microphone so all the jurors can hear you.

THE WITNESS: I am a typist. It could be a typographical error, too.

BY MR. MALLOY:

Q. Was that your typing? [22] A. It's not my typing, no. I never saw the document before I signed it.

Q. Did you know Mr. Benjamin Simmons before? A. No, I didn't. I had never met Mr. Simmons before.

Q. Does this state here—well, you read what it says there. A. Them and my will to Mr. Benjamin Simmons in case of my death.

Q. Is that Mr. Benjamin Simmons? A. Yes.

Q. There isn't any "J" in front of that, is there? A. I don't really know.

Q. On that paper. Is there a "J" there? A. There is not a "J" before it, no.

Q. Now, I show you the second page. Does that not look as if that "J" were added there? A. It's a "J".

Q. Doesn't it appear as if it was added later, since it is out of line there? A. Not necessarily, no.

Q. If you were typing would you have it that way? A. I might, yes.

Q. Have it out of line like that? A. It could very possibly be, yes.

[23] Q. I ask you whether or not this states, the above-named testator. A. Um, hum.

Q. Would Mrs. Lester be a testator? A. I don't really know. I am not familiar with legal language.

Q. Wouldn't she be a testatrix? A. She might possibly be, yes.

Q. And— A. I am not sure.

Q. —you are sure though that she could see? Now, as a matter of fact, didn't Mrs. Lester have trouble with her eyes for sometime before? A. Mrs. Lester could see better than I can.

Q. Well, you just—the question—I don't know how well you can see, so just let's confine our answers to Mrs. Lester. A. Yes.

Q. Didn't she have trouble with her eyes? A. Mrs. Lester had very little formal education so she might very well overlook something like that.

Q. She had very little formal education? Did she tell you that or did you observe that from her actions and words, etc.? [24] A. No, she often stated that she only had a third grade education, but she knew that she had better sense than a lot of people with a lot of education.

Q. She had a third grade education? A. Yes.

Q. With the matter—and you say that she could see and she wouldn't object to the 1625 S Street, Southeast? A. No, I don't really believe so.

Q. When your father called you to come and act as a witness to the will, where were you? A. I was home with my children.

Q. Did you get a babysitter then with the children? A. No. My mother took care of the children while we went over.

Q. Then you called your husband George? A. Yes, I did.

Q. And then how did you get over to Mrs. Lester's? A. My husband picked me up. We dropped the children with my mother and then we went over.

Q. Your husband was then working where? A. He was working at Marlo's Furniture Company.

Q. Then he drove from Marlo's Furniture Company. Where is that located? [25] A. That is located on—see, he worked at the warehouse. That was on—out near New York Avenue.

Q. Northeast? A. Yes.

Q. Then he drove over to Virginia? A. Yes.

Q. And then brought you over to Mrs. Lester's? A. Yes, he did.

Q. At 1525 S Street, Southeast? A. Yes.

Q. There is no question about where she lived, is there? A. No. She lived at 1525 S Street.

Q. Now when you got there your father opened the door for you? A. Yes.

Q. And then he brought you—he accompanied you in and then the dog started jumping around and he took the dog then to the adjoining room?

A. Yes, he did.

Q. And the adjoining room is about what—15, 20 feet away? A. I would think 20.

Q. And he then was there during the time with the dog? A. Yes.

[26] Q. Now, when the will was executed did you see it again? A. No, I didn't.

Q. Do you know whether your father took it to your home in Virginia? A. No, I don't know.

Q. Do you know whether or not your father had in your—oh, you weren't living with your father? A. No, I don't.

Q. Do you know whether he had in his possession at any time when you had been living and before your marriage? A. I knew at one time he was supposed to have had but I never saw the document.

Q. You did know he was supposed to have papers for— A. At one time.

Q. When were you married? A. I was married 1959.

Q. '59? A. Yes.

Q. Did you know that your father was the principal beneficiary in this will? A. No, I didn't.

MR. MALLOY: That's all.

THE COURT: Anything further?

[27] MR. POSTON: That's all. Plaintiff rests, Your Honor.

THE COURT: You may step down.

Well, we will recess at this time until tomorrow morning.

Ladies and gentlemen of the jury, we are going to recess this trial until tomorrow morning at ten o'clock.

You will be excused at this time, and please be back in the court room a few minutes before ten o'clock tomorrow morning.

(Whereupon at 3:49 p.m. the hearing of this cause was adjourned until ten a.m., Thursday, March 17, 1966.)

[29]

[ March 17, 1966 ]

THE COURT: We will resume the case on trial. You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: You may proceed.

MR. POSTON: Your Honor, before the defense gets started I would like to show the will to the jurors.

THE COURT: Yes, indeed. You say before the defense is started Do you rest?

MR. POSTON: Yes, Your Honor.

THE COURT: Very well. You may pass it to the jury.

(The document was handed to the jury.)

THE COURT: You may proceed, Mr. Malloy.

ELSIE M. PINNEY called as a witness, having been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name? And keep your voice up so that the jury can hear you. A. Elsie M. Pinney.

Q. Where do you reside? A. 8019 Eastern Avenue, Silver Spring.

[30] Q. What relationship do you bear to the deceased, Emma O. Lester? A. Sister.

Q. How closely were you associated with your sister during her lifetime? Q. Quite closely.

Q. What was the date and place of your sister's death? A. September 1, 1965.

Q. Where did she die? A. Casualty Hospital.

Q. Was she survived by any relatives other than yourself? A. My Brother Walter, my sister Marie.

Q. Will you tell us briefly your sister's personal history, that is, the date of her birth and any other pertinent— A. April 13, 1884.

Q. Where was she born? A. Baltimore, Maryland.

Q. Had she been married? A. She was married, divorced, and remarried. Her second husband died.

Q. Did there come a time when you and your sister [31] purchased 436 New Jersey Avenue as a family home? A. Yes.

Q. When was that? A. About 1918.

Q. And then who resided at 436 New Jersey Avenue. A. The family.

Q. The family. Did that include you mother and father? A. Yes.

Q. And your brother Carol and you and Marie? A. My brother Howard.

Q. Was brother Carol there also? A. Yes, sir.

Q. Now, then, did there come a time when you left 436 New Jersey Avenue? A. Yes.

Q. Now will you state the reason for leaving? A. My sister Emma had struck my father with an umbrella. My brother Carol came to me and said, Elsie, there has been some more trouble around the house.

MR. POSTON: Objection, Your Honor, as to what Carol said to her.

THE COURT: I will sustain the objection as to what the father told this witness.

[32] BY MR. MALLOY:

Q. Then proceed. What, if anything, you did, without saying what he said. A. We went looking for another house so as to take my mother and father with us.

Q. And did you find another house. A. Yes, at 4901 Fifth Street, Northwest. Q. And then did you and your brother Carol and your mother and father move there? A. Yes.

Q. And then for how long a period did you have your mother and father with you? A. From 1929 until 1945.

Q. Is that the time of their death? A. Yes, sir.

Q. Now, then, with reference—after you left did you remain on friendly terms with your sister Emma? A. I did.

Q. Will you state what, if anything, you did to cooperate with her at that time, after you had left 436? A. I went down there—I was working. I went down over weekends to try to get her rooms in condition for renting. I scraped wallpaper, I did everything I could to help her.

[33] Q. Did your brother Carol help in any way? A. Yes, he did.

Q. At that time did your sister Marie go with you or did she remain at 436 New Jersey Avenue? A. She remained at 436.

Q. And she continued to live with your sister Emma? A. Yes.

Q. Was your sister Emma employed at that time? A. She was employed in the Post Office Department for a short period and then in the Government Printing Office.

Q. Did she retire from the Government Printing Office about July 1st, '47? A. Yes.

Q. And at that time your sister Emma was 63 years of age, is that right? A. Yes.

Q. Will you state any change in the condition of your sister following her retirement? A. Well, I think her health progressively got worse. She had had scarlet fever as a very small child, about two and a half years old. It left her with a discharge from her right ear. Later on in life that discharge went towards the throat. She used to get what she called a knot in her throat [34] and during that time she suffered a great deal with her head. Once she got that knot removed she had a little better health for a while, but she worked on that for an awful long time.

Q. Did you notice any change in her attitude or conduct during that time and continuing? A. She was pretty hard to get along with at times. You had to humor her.

Q. Calling your attention to the year about 1952, did she have an operation for cancer at Providence Hospital? A. That is right.

Q. And during that time did you or your sister Marie in any way help or cooperate with her? A. We both did.

Q. What, if anything, did you do? A. We were—one or the other of us went to the hospital every day, and when she came home I nursed her.

Q. Will you state what, if any, change in the condition either of your sister's personal manners or the house during that time? A. Well, she couldn't go on like she had been going. She had to slow up somewhat. I did all I could for her at the time, and I don't know what specifically I can say.

Q. Did you notice any change in her personal appearance, [35] whether tidiness or untidiness? A. Well, my sister had a very peculiar way of dressing. She wore the same kind of dress for over 20 years. She had to have it made, she couldn't go up to the store and buy a dress.

Q. She couldn't go to the store and buy a dress? A. She wouldn't wear a store dress. She had to have a certain type of dress.

Q. Do you know whether or not your sister Marie made or helped make any of these dresses for her? A. She made them for quite a while.

Q. With reference to her personal conduct following 1953 did her condition of tidiness or untidiness change in any way? A. She was untidy.

Q. Did you have occasion to nurse her at premises 436 New Jersey Avenue after the operation at Providence? A. Yes, I did.

Q. Will you state what the condition was and what you did for her, if anything? A. Well, I did everything I could. I nursed her, I cooked her meals, I served her in bed. She had a dog that she allowed to sleep on the bed, [36] and the dog would jump up on the bed and jump on her and hurt her.

THE COURT: Do you want to fix the period?

MR. MALLOY: 1953, she had said, if Your Honor please.

THE COURT: Was that after 1953?

THE WITNESS: '52, wasn't it?

BY MR. MALLOY:

Q. It was after that? A. Yes.

Q. Did you observe anything with reference to the condition of the house, whether it was clean or unclean? A. She had begun to accumulate so much. She was one that very seldom ever threw anything away. You had a small place to walk through.

Q. Did you have any observation or did you have occasion to observe a condition with reference to any trouble with her legs? A. That was later. She had varicose veins and I found her with a knot like half an egg on her leg with small knots around it.

Q. Did you do anything to alleviate the pain or to reduce the knots? [37] A. I nursed her during that period for about a couple of weeks, but I nursed her in accordance with what she told me to do because she never had the doctor come to the house. I told her I would like to have doctor's instructions, but I never got them except what she told me.

Q. Did she ever say anything to you about any action of the neighbors with reference to either her or her dog? Was anything ever said

by her as to poisoning? A. Oh. She accused the neighbors of trying to poison the dog and poison the cats.

Q. You did say with reference to the house, but was the house tidy or untidy? A. It progressively got worse. It was very untidy.

Q. Did you endeavor to do anything to have your sister do anything about changing her status or condition? A. When she had so much trouble with tenants at the beach place and tenants at 436 New Jersey Avenue, I tried to get her to sell and move into an apartment where she would be relieved of so much responsibility, but she wouldn't do it.

Q. This dog that you spoke about, what type of dog was it? A. A collie.

Q. You said it had the run of the house and slept on [38] her bed? A. Yes.

Q. Did that have anything to do with the dirt or filth in the house? A. Well, she always kept a plate of food for the dog. I said, Emma, that draws roaches, if the dog doesn't eat it let me take it away. She says, No, leave it there, if he doesn't want it this morning he will eat it this evening, he will eat it when he gets hungry.

Q. Did you ever notice any change -- you have said that the place was dirty and unkept. Did you notice any other conditions of your sister following the year 1953? A. Well, when I was nursing her the last time, when she had the varicose veins, she had reached the point where she was able to get up and come to the table for her meals. And I went to make her a piece of toast and a roach ran out of the toaster. Well, I recoiled because there is nothing I dislike more than a roach. And she started to fuss at me. I have never fussed with Emma, so I got up and left the table and went upstairs and stayed about five minutes and then I came down. And there wasn't anyone else there for her to talk to and I heard her saying G.D.S.B., so I knew she was talking about me.

[39] Q. G.D.S.B., she called that out loud? A. Yes.

Q. Had she been accustomed to cursing or swearing? A. More and more in her later years.

Q. Calling your attention to a time about June 15, 1965 did you have occasion to visit your sister at that time? A. Yes.

Q. Where was she then residing? A. 1525 S Street, Southeast.

Q. And she had changed her address shortly before that, is that true? A. Yes, she moved in April.

Q. Will you state what, if anything, occurred when you went to visit her about June 15th, 1965? A. I rapped at the door and I heard her walk towards the door and she said, Who is there? And I wasn't that far away from her (indicating).

Q. Did she open the door? A. When I answered her I said, It's Elsie. Then she opened the door.

Q. Could she see you? A. No, she could not.

Q. How far from her were you? [40] A. Not more than two feet.

Q. About two feet away. And she did not recognize you until you said this is Elsie? A. No; she recognized my voice and what I said, but she did not see me.

Q. But she recognized you when you said this is Elsie? A. Yes.

Q. Did you have occasion to see Mr. Leon Fisher about the premises? A. Yes.

Q. Was he there frequently or otherwise? A. He was there frequently.

Q. Did you hear him state, with reference to the will, that he had procured the copy of the --

THE COURT: I wouldn't ask leading questions.

BY MR. MALLOY:

Q. Did you hear Mr. Fisher say anything about the paper writing purporting to be the will in this case? A. No.

Q. Do you remember being present at a deposition? A. This was the 15th of June when I saw my sister.

Q. You are talking about the 15th of June. At that time did Mr. Fisher, or not, have any influence on your sister?

[41] MR. POSTON: I object to that question.

THE COURT: Objection sustained.

BY MR. MALLOY:

Q. Did your sister -- did you see Mr. Fisher at the beach property? A. Yes.

Q. Did your sister have some litigation over the beach property about 1963? A. Yes.

Q. Will you state whether or not that had any change in her attitude or what happened about it? A. She was quite worried over it and she told me she felt like she was going crazy.

Q. Did she say anything with reference to the attorney?

MR. POSTON: Objection, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: Shall I answer?

MR. MALLOY: Yes.

THE WITNESS: She asked me -- she told me that they had been making practically no progress with the case and she asked me if I knew a lawyer in Maryland that she could get, that she was not satisfied with what Mr. Simmons was doing.

MR. POSTON: Your Honor, I move that this be struck, [42] this testimony. I don't see that it has any relevance to this case.

THE COURT: Anything that the deceased said would be admissible. Its probative value might be slight, but I think it is admissible.

I sustained your objection when there was testimony as to something that somebody else had said to the deceased. That was a little different.

BY MR. MALLOY:

Q. With reference to -- this litigation was in reference to the bay-front property at Deale Beach, Maryland, is that right? A. Yes.

Q. With reference to that property, when had it been acquired? A. About '39.

Q. 1939? A. Yes.

Q. And from 1939 on did the family do anything with reference to improvement of the property? A. The family always worked down there.

Q. What was done by the members, other than the deceased, with reference to it? [43] A. The family did most of the building of the sea wall. My brothers did the pine paneling on the inside of the house. When the house was put up it was just the outside frame. The inside work was all done by my brothers.

When she kept talking about it being the family place we all gave towards the cottage. I, myself, I am speaking just for myself, I gave her two double beds, a half-dozen sheets and a dozen pillow cases, and every weekend that I went down I took cooking utensils or anything that was needed around the kitchen because that is where my time was spent most of the time.

Q. Was anything said by your sister with reference to a stroke? A. When she knew she had sold the 436 New Jersey Avenue house she started right to work and she told me she had been bringing down a lot of things from upstairs. I don't know what they were. They might have been linens or something that was easy to carry. Anyhow, she became ill and she told me that Mr. Fisher said he thought she had had a slight stroke.

MR. POSTON: Objection, Your Honor, to that.

THE COURT: Objection sustained.

MR. MALLOY: No, the decedent said this, if Your Honor please. The decedent told her that.

[44] THE COURT: I understood her to say that Mr. Fisher said it.

MR. MALLOY: No, she says that Emma told her that Mr. Fisher told Emma she had a slight stroke.

THE COURT: Will you read the answer, please?

(The Reporter read the last answer.)

THE COURT: Objection overruled.

BY MR. MALLOY:

Q. Did your brother Walter and Marie do anything, to your personal knowledge, with reference to the improvement of the beach property? A. We all worked on the beach property.

Q. Was that for a long time or a short time? A. A long time.

Q. Now, with reference to Mr. Fisher's work there, did your sister ever say anything to you as to whether or not he was paid for any services he rendered? A. She always said he was paid for everything he did for her.

MR. POSTON: Objection, Your Honor. That is strictly hearsay.

THE COURT: Well, it is what the deceased said. I will admit anything the deceased said.

[45] BY MR. MALLOY:

Q. Based on the facts you have just related with reference to your sister, do you have an opinion as to whether your sister on July 1st, 1965 was of sound and disposing mind and capable of executing a valid deed or contract? A. No, I do not.

MR. POSTON: Objection again, Your Honor. I don't think there is any foundation laid for her opinion.

THE COURT: Under the rule in this jurisdiction a layman can express an opinion provided before expressing the opinion the layman testifies to facts on which the observation is based. Whether the facts are sufficient to justify the opinion is a matter of probative weight of the opinion rather than its admissibility.

I will overrule the objection.

THE WITNESS: When I went home after nursing her at the varicose vein time, Mr. Fisher rode me up to the bus stop and during that time I told him that she was pretty well on her feet --

THE COURT: Don't tell us what you said.

BY MR. MALLOY:

Q. Just say what Mr. Fisher said and with reference to what he

said it. A. Well, how am I going to bring this out? I said [46] something to him and he answered.

Q. Was it with reference to your sister's health or conduct? A. Yes.

Q. Then what did Mr. Fisher say with reference to that? A. I was telling him about how she had cursed at me and I said, I guess maybe I could have stayed a day or two longer, but she was on her feet and I just couldn't stand being cursed. So he said, Well, you know, if she starts fussing at me I just stay away from her for a while.

Q. Had your sister told you that Fisher was rendering any services which you had asked to do or volunteered to do for her? A. I always did whatever she asked me to do.

Q. Did you call her or did she call you over the telephone for any services? A. Not particularly. We talked to each other over the phone quite frequently.

Q. Was there ever any trouble with reference to dialing the phone? A. I had a limited phone. She had an unlimited phone. So we decided she would call me. For a while she didn't call me for a long time and I wondered what was wrong because you [47] never knew whether she was going to be in a good frame of mind or a bad frame of mind. So it went on for some time and I said to my sister-in-law, I wonder what's wrong with Emma, I haven't heard from her. My sister-in-law told me that I would have to call her.

And when I got in touch with her I found out that she couldn't see to dial the phone.

Q. She couldn't what to dial the phone? A. She couldn't see to dial the phone.

Q. She couldn't see the numbers on the -- A. That's right.

Q. Did your sister say anything to you with reference to an offer of the sale of the Deale Beach property? A. She told me that one of the real estate agents down there told her it was worth \$27,000 but that she wanted to keep it for a family home.

Q. Did the family go there frequently and visit with her on friendly terms? A. Quite frequently, much more before my father and mother died.

Q. Did there come a time in 1963 when this litigation was on, that it was impossible to gain entrance to the place? A. Yes, she was even kept out.

[48] Q. Did that period extend very long or short? A. It was into the third year.

Q. Third year from 1963? A. '62, wasn't it?

Q. '62. I show you what has been marked as Caveator's Exhibit A and ask you if you have seen that before? A. Is this the doctor's report? No, if this is the doctor's --

Q. This is the death certificate. Do you want your glasses or do you have your glasses? A. No, I don't have glasses with me.

MR. MALLOY: I would like, if Your Honor please, you have this, this is marked, I would like to introduce this.

THE COURT: Are you offering it in evidence?

MR. MALLOY: Yes.

THE COURT: Let it be admitted.

THE DEPUTY CLERK: Defendant Exhibit No. 1 marked in evidence.

(Defendant's Exhibit No. 1 for identification was received in evidence.)

THE COURT: You may pass it to the jury or read it if you wish.

MR. MALLOY: Yes, Your Honor, I would like the [49] jury to see it.

(The exhibit was handed to the jury.)

THE COURT: You may proceed in the meantime.

BY MR. MALLOY:

Q. When did you first learn of the existence of this paper writing purporting to be the last will and testament? A. After my sister's death.

Q. Had you been on friendly terms with Mr. Fisher? A. Yes.

Q. Had your brother Walter and sister Marie been on friendly terms with him? A. So far as I know.

Q. Did he visit the beach property? A. Yes.

Q. Were you always on friendly terms? A. Yes.

Q. Was there one or two properties at the beach? A. Two.

Q. The one in which you state you and the other members of the family performed the work in constructing the wall was known as the bayfront property? A. That is right.

Q. That is right on the bay, is it? [50] A. Yes.

Q. And the other property, where is that located with reference to the bayfront property? A. Back from the bay.

Q. Back some distance? A. Yes.

Q. You have stated that your sister had an offer of \$27,000 for the place and she decided to refuse it? A. No, sir, I did not state she had an offer. The real estate man told her it was worth \$27,000.

Q. And she said she didn't want to sell it because of the fact she wanted to keep it for a family home? A. It was always supposed to be a family home.

Q. And you all had worked on it and so understood that? A. Yes.

Q. With reference to the other bayfront property or the other property at Deale Beach, do you have any knowledge as to its approximate value? A. No, I wouldn't have anything to say about that.

Q. Now, you said that you first learned of the existence of this paper writing after your sister's death. Where did you learn of that? [51] A. Mr. Simmons' office.

MR. MALLOY: You may cross examine.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. Mrs. Pinney, Mrs. Lester also discussed a lot of lurid newspaper stories with you also, didn't she? A. It depends upon what you mean by lurid.

Q. Well, I mean she would discuss tragic happenings that she read in the newspapers, isn't that correct? A. She didn't read the whole stories, she read the headlines.

Q. But she would discuss what she had read in the newspapers with you? A. Yes.

Q. And she took the newspaper every day, didn't she? A. No, she didn't.

Q. She didn't take the newspaper every day? A. No, she didn't.

Q. How often did she take the newspaper? A. When the tenants from upstairs brought one down to her.

Q. She did not have one delivered to her door every day? [52]

A. No.

Q. When she looked at fine print she used a magnifying glass, did she not? A. Well, now, I wasn't there when she was reading newspapers. All I know is what she told me.

Q. You have seen her magnifying glass? A. Yes, I have.

Q. And you have seen her use it when she reads? A. I didn't see her read very much.

Q. Mrs. Lester did her own housework right up to the time she died, did she not? A. Yes.

Q. And she did her own cooking? A. Yes, so far as I know.

Q. She handled her business transactions? A. Not on her own altogether.

Q. Now, with regard to your relationship with Mrs. Lester, you mentioned the fact that she had struck your father years and years ago, is that correct? A. Yes.

Q. And you disapproved of this, did you not? A. I didn't know anything about it until my brother asked me to take my mother and father and take them away from [53] the house.

Q. Did you disapprove of this? A. Why, of course, I disapproved of it.

Q. You resented her because of this, did you not? A. No, I didn't.

Q. But you did disapprove? Did you disapprove?

THE COURT: She has answered the question. She said of course I did.

BY MR. POSTON:

Q. And Mrs. Lester knew you disapproved, isn't that correct? A. I don't know what she knew about it because I never mentioned it to her.

Q. And you also disapproved of the way Mrs. Lester dressed, did you not? A. Mrs. Lester could dress any way she wanted to dress. I just say that she had a peculiarity about her dress.

Q. And you complained to her about the way she dressed? A. No, I didn't.

Q. Did you complain about the way she kept her house? A. Yes.

Q. You complained about that to her, isn't that [54] correct? A. Only in a very minor way.

Q. Didn't she resent your complaining about her house and about the way she dressed? A. No.

Q. She didn't resent -- A. Because I did not say anything about her dressing.

Q. Now, Mrs. Pinney, on July 21, 1965, which was some 21 days after she executed her will, she was, to your knowledge, carrying on a business transaction in connection with a tombstone for the family burial site, is that correct? A. I didn't know anything about that when she did it.

Q. Well, weren't you discussing it with her during the period of her negotiations on this? A. No.

Q. Now, I call your attention to a deposition that was -- your deposition which was taken in Mr. Simmons' office. Do you recall that?

A. Yes.

THE COURT: We will suspend at this time for our usual mid-morning recess.

(Recess.)

THE COURT: You may proceed.

[55] MR. POSTON: Will the Reporter please read the last question and answer?

(The reporter read the last question and answer.)

BY MR. POSTON:

Q. And that was on December 3rd, 1965, is that correct? A. When?

Q. December 3rd, 1965? A. I don't know what the exact date was. It was when we were called for the reading of the will.

Q. No; wasn't there a time when your deposition was taken in Mr. Simmons' office? A. Oh, that was later, yes.

Q. And that was on December 3rd, 1965? A. I don't know the exact date.

Q. You were under oath at that time, were you not, as you are here today? A. Yes.

Q. Do you recall in the deposition Mr. Simmons showing you the contract that Mrs. Lester had entered into for the tombstones? A. Yes.

[56] Q. This is on page 109 of the deposition. I read you this, Mrs. Pinney, and ask if this is the truth.

THE COURT: No, you may ask her if she gave the answer.

BY MR. POSTON:

Q. I ask you if these were your answers at that time, Mrs. Pinney: "Mrs. Pinney, I show you Caveatee's Exhibit No. 3 for identification and ask if you participated with her in that transaction, and if so, in what manner?

"Answer: No, she did this on her own. She told me about it afterwards and I said, Well, Em, I will be halves with you on that stone. You see, the lots are in Carol's, Walter's and my name. Three of us own the ground there. For quite a time Emma had wanted a stone put on the lot, but Walter, Carol and I never got together, and so she went ahead and did it on her own.

'Do you see her signature on that document there you are holding in your hand, Caveatee's Exhibit No. 3?

"Answer: Yes.

[57] "Question: Do you think she had the mental capacity to make that transaction at the time it was made?

"Answer: This is one thing her mind had been set on for years, so it was well installed in her mind what she wanted to have done.

"Question: On the date she executed that document there is no doubt in your mind she had the legal capacity to do so?

"Answer: I think so, because she wanted it so badly."

Do you recall making those answers? A. Yes.

Q. Is that true? A. Yes.

Q. Do you feel that it's true today? A. Now don't confuse the big stone with the small stones.

Q. No, I am just referring to the matter of her mental competence at that time. You thought at that time, when she executed that contract, she was mentally competent, did you not? A. She was the type woman that if she wanted to do [58] a thing she pushed and pushed and pushed it.

THE COURT: You are not answering the question.

BY MR. POSTON:

Q. You thought at the time your deposition was taken that when she executed this contract some three weeks after she executed the will she was mentally competent, did you not? A. Was that three weeks after she executed the will?

Q. That is correct, on July 21st. A. Well, if she did, then she was competent to do that because it was one thing that she wanted.

Q. Now, you at no time, Mrs. Pinney, ever suggested she see a psychiatrist, did you? A. No, I didn't.

Q. Did you feel that she -- did you ever suggest she be committed to a mental institution? A. No, I didn't.

Q. Mrs. Pinney, you have made mention of the fact that she at one time was dissatisfied with Mr. Simmons, is that correct? A. That is right.

Q. This was after the trial had ended concerning the boundaries of her beach property, isn't that correct? A. No.

[59] Q. Wasn't that after the judge had taken it under consideration? A. The case had not come to a conclusion.

Q. But she had been at the trial and all the testimony was in, wasn't that correct? A. Yes, but they hadn't gotten any verdict. She was thinking that Mr. Simmons wasn't pushing it enough.

Q. And the judge was a very long time in rendering the decision in that case? A. Yes.

Q. And it was finally learned that he had had a heart attack, isn't that correct? A. My sister found that out.

Q. And so it was some many, many months before he rendered a decision, isn't that correct? A. Yes.

Q. When he did render a decision he rendered it in Mrs. Lester's favor, did he not? A. Yes.

Q. After that Mrs. Lester's attitude toward Mr. Simmons changed, did it not? A. I don't know.

Q. Wasn't she pleased with him after that? [60] A. I never heard her mention whether she was pleased or not.

Q. In this litigation that she had over the boundaries of her beach property which lasted for so long a time, did you at any time go down to the trial of this case? A. No.

Q. Were you ever a witness? A. No.

Q. Mrs. Pinney, how many times was Mrs. Lester in your home over the last five years of her life, to your best estimation? A. I never counted them.

Q. Were there many times that she actually visited you? A. Quite a few times.

Q. How many times in the last year of her life did she visit you?

A. I'd say four or five.

Q. In the last year of her life? A. Yes.

Q. And would she come on her own to your home, is that correct?

A. No, Mr. Fisher would bring her.

[61] Q. And how long would she stay? A. 15, 20 minutes.

Q. And was that because she was on her way somewhere else? A. He was on his way to make deliveries in Silver Spring and he would bring her up and she would stay for just until he made his deliveries and come back and pick her up.

Q. And it is your testimony that during the last year of her life she visited your home four or five times? A. Yes.

Q. Do you have any idea what the dates of these visits were? A. No.

Q. Mrs. Pinney, you knew of a prior will to the one that is in question here today, did you not? A. I did not.

Q. You didn't know of a will that she made in 1951 or '52? A. I did not.

Q. Mrs. Lester was a hard working woman, was she not? A. Yes.

Q. Was she thrifty? A. Very.

[62] Q. She didn't ever want to throw anything away, did she? A. No.

Q. In fact, she had most of the things in her house that she ever had in her life, did she not? A. Yes, it was cluttered.

Q. She was the type woman who would rather go up on the roof and fix the roof than to clean her house, isn't that right? A. Please repeat.

Q. And fix a roof. I say, wasn't she the type that would much rather do outside work than inside work? A. Yes.

Q. She would much rather work on her beach property, on the wall than to keep her house in a tidy manner? A. She didn't work on the wall, but she would paint the benches or paint a boat or rake the lawn, do things like that.

Q. She didn't have much use for housework, did she? A. No, she didn't.

Q. With her dealings with other people in business she was pretty hard bargainer, wasn't she? A. She would always gloat over when she got the best [63] of somebody.

Q. She usually got the last ounce of the deal, didn't she? A. Yes.

Q. At times she was temperamental? A. Very.

Q. And she was noted sometimes to curse a little bit, isn't that right? A. Quite often.

Q. What was her relationship with Marie Bailey over the last 12 years? A. None at all.

Q. She wouldn't even speak to Marie Bailey, would she? A. Well, it was, I think, a mutual affair.

THE COURT: What was your answer?

THE WITNESS: I think it was a mutual condition.

BY MR. POSTON:

Q. Marie Bailey had sued her one time, isn't that right? A. I believe so.

Q. No one was completely safe from her ire at times, were they? She would fuss with Walter at times, would she not? A. She fussed with anybody that she had a grudge against.

[64] Q. She and Walter had their ups and downs over the years, isn't that true? A. Everybody.

Q. Now, Mrs. Pinney, if this will was barred from probate you would realize considerable more money than under the will, isn't that correct? A. I don't know what it would be for me.

Q. You know you would get a lot more, isn't that correct? A. I don't know what it would be.

MR. POSTON: Excuse me a minute, Your Honor. (Pause)

No further questions.

THE COURT: Any redirect examination?

## REDIRECT EXAMINATION

BY MR. MALLOY:

Q. You stated, with reference to the visits to your home, that Mr. Fisher would drive her there.

Do you know whether or not Mr. Fisher had any other employment other than his regular employment at that time? A. He had two jobs. One was delivering these packages in the morning, and working in the Government Printing Office in the evening.

Q. Did your sister -- did you ever ask your sister to visit you and she made any reply with reference to the convenience [65] of Mr. Fisher? A. She said she couldn't ride the buses, the odor from the gasoline affected her head, and she didn't like taxicabs. So she would rather pay him for taking her places than to use any other mode of transportation.

Q. Did she say anything with reference to his convenience as to the time of the visit to you? A. Well, he'd be making deliveries in Silver Spring, drop her by my apartment, and she'd stay there until he was on his way back and pick her up.

Q. And so that the times of the visits were in order to suit the convenience of Mr. Fisher? A. Oh, yes.

MR. MALLOY: That is all.

THE COURT: Anything further?

MR. POSTON: No, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you.

[66]

WALTER BAILEY

called as a witness, having been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you state your name, and keep your voice up so that the jury will be able to hear you. A. Walter Bailey.

Q. Where do you reside, Mr. Bailey? A. 1201 Burton Street, Silver Spring.

Q. What relationship do you bear to the deceased, Emma O. Lester? A. Brother.

Q. How closely were you associated with your sister during her lifetime? A. I'd say as close as any brother and sister.

Q. Your sister died on September 1st, 1965 at Casualty Hospital?

A. Correct.

Q. Were you at the hospital after she had the stroke in August? A. I was there almost continuously till she died.

Q. Will you tell us briefly your sister's personal [67] history as you know about it? A. How far do you want to go back, 30 years?

Q. Well, from the date of her birth up until the time when you noticed any change or what the situation was. A. She was born before I was. She was older than I was, so I only know her after I became conscious of the relationship.

Emma and I both, in our younger days, had scarlet fever. It left both of us very deaf.

Well, we grew up in a small town called Quantico. It's where the Marine Base is now. We went to school there. It was hard to get Emma to go to school.

But after we got up a little bit of age, our family moved away. It became very hard to make a living there, so we moved up into Delaware, and Emma left us and went to work for the National Hotel, later on the Ebbett Hotel.

Q. You said that Emma disliked to go to school. How much or how little schooling did she have? A. Oh, it's hard to tell because it was a

country school where they had all the classes in a one room, and you was in one class one minute and another one another time, depending on what the subject was.

Q. Were they approximately about how many grades? [68] A. Third, fourth grade; somewhere around there.

Q. She never exceeded the fourth grade? A. I don't think so.

Q. Did your sister later work at the Government Printing Office? A. Yes.

Q. And did she retire from the Government Printing Office about 1947? A. I think so, yes.

Q. Now, with reference to your getting along or not getting along with your sister, will you please state your relationship? A. I don't believe I ever had a real cross word with her. I tried to argue with her, be persuasive, but we never had any fuss all our lives.

Q. Did there come a time when you and your brother Carol had a boat and that you took your sister and your other relatives? A. Yes.

Q. Will you state when that was about? A. Oh, we had a boat for 30 years. I can't remember when we first obtained it, but probably in the '20s, somewhere along in the '20s.

[69] Q. Did there come a time when you became interested, the family, in Deale Beach property? A. Well, we had found out that Mama had arthritis very bad and the pains and all seemed to be terrific. The doctors didn't do her much good. And we found out by taking her around the water, especially on the beaches, that she would be greatly relieved. And we first started taking her down in the summertime and spend the summer along the seashore or along the river shores, down on the Patuxent River and the Potomac River.

Then we used to take her down on the boat a good bit. We thought that would be of help.

Emma obtained the Deale Beach property. That was somewhat later, along in, oh, '39 or '40, somewhere around in there.

Q. And then was it first used as a meeting place of your family?

A. Yes, before we had a cottage built we used to go down and have picnics and that kind of stuff on the grounds. We thought that was a big help to Mama. The water was very shallow and we could get her out into it and she would sit in the water and seemed to get a great deal of relief.

Q. Did there come a time when a cottage or property [70] was erected on the lot? A. Yes.

Q. And will you state what, if anything, you and the other members of the family did in connection with that property? A. Well, Emma had the cottage built. Emma had bought the ground and she had the cottage built. But the cottage was just a shell, it had nothing into it, it wasn't finished inside or anything.

Q. Did the members of the family do any work on the wall or in the matter? A. We never stopped.

Q. Well, will you state to the jury so that they will understand what you did in connection with the property? A. Well, the first thing, it had a couple bad storms and the ground commenced to wash away, and we built a bulkhead, had heavy posts put down and planks across it to keep the water from washing the land away. That didn't last very long. We had a heavy storm and it just tore it all to pieces. So we decided then there was only one thing to do and that was build it up with stone.

We started obtaining stone from up near Annapolis, there was a quarry there, and we brought it in on scows and [71] threw it up against the land, and we thought that was going to do the trick, keep it from washing away; but the water would wash over top of the stones and come down and keep carrying the land away and the stones sunk down into the mud, oh, I believe they are down there five or six feet. And it required an awful lot of material. We had that hauled in there over a period of ten years.

Every year whatever money we could spend we would put into stone and have a few scow loads brought in and piled up against the land. After a while that became a very firm foundation when it sank down and became solid, and then we started building a wall up on top of that.

Q. And that continued then for a number of years? A. It's never been finished up till about five years ago.

Q. Did there come a time about 1963 when there was some litigation concerning the Bay Front property? A. Yes.

Q. Was it possible to use it or to occupy the place at that time during the litigation? A. We couldn't get into the place. They had built a fence across the road.

Q. And that was what the litigation was about? [72] A. Yes. Previous to that, I'd say about two weeks before they built that fence across there and suit was filed, Emma, my wife, the dog and myself were there. A man nextdoor who owned the property next to her owed her some money and I had taken her down to see if she could collect it, and while we were there we done some work around the place, fixed the pump and I believe the stove and various things of that kind.

While we were working around a man came down the road with one of these big tractors, a bulldozer, and he started running back and forth on her road, and the next thing I know she was out there fussing with him. They were cussing one another. She started to tear into the house, she says, I'm going to get the gun and shoot you.

Well, I heard it, it was quite loud, and I grabbed her and held her. And my wife was on the front porch, which was away from where this was happening, but she heard us and she come running in.

And I got her quieted down and sat there and talked to her and told her that she mustn't do those things, that there was better ways of settling than that.

And this man drove off and went on back around the field and back up to another house that is up there. I presume he owned the house.

[73] Q. Did you visit your sister when she lived at 436 New Jersey Avenue, Southeast? A. Oh, hundreds of times, yes.

Q. How had that house been first purchased or procured and by whom, if you know? A. Well, my sister Elsie and Emma bought that house.

Q. Was that for a family use? A. Yes.

Q. And did the family reside in the house? A. Oh, yes, we were all together there for quite a while.

Q. Then did there come a time when Elsie and Carol took your mother and father away? A. Yes, they bought a place up at 4901 Fifth.

Q. Do you know the reason why they left? A. Well, it was over trouble with Emma and my father.

Q. What was the trouble? A. Well, I didn't see it. They told me about what happened. I was at work. I understand she beat him up with an umbrella.

Q. Following that did Elsie and Carol and you remain on friendly terms with your sister? A. Oh, yes, yes. We just thought it was best to [74] get them separated, that's all, if they were going to act that way.

Q. Did you ever do any work or render any service for Emma at the New Jersey Avenue house? A. Oh, yes, lots of times.

Q. What was the nature of the service? A. Well, when my oldest brother was living he used to help them around, taking care of everything from the furnace to spigots and stuff like that. There is always a lot of work to be done around the house.

When he died, naturally, she had been used to it and I tried to take over to help her out, and many times during the year, especially every fall, I used to go down and try to overhaul everything I could to see that it was in good shape for the winter.

Q. Did you ever have occasion to observe her or to have any conversation with her with reference to the work that you had done there?

A. Oh, yes, sure. We had to talk to find out what was --

Q. Did there ever come a time when she made any complaint about any of the work that you did? A. Only one time that I know and that was in, let's [75] see, October of '64. The heating boiler had burst and was leaking. I went down and fixed that up and got it in good shape and seen that everything was all right.

And a little bit later on, when they made a fire, she asked me to come by, called me on the phone and asked me to come by to see what the trouble was. And I looked everything over and I couldn't see anything wrong.

And I said, Emma, what's your difficulty, what you want me to do? She says, That gauge is up too high.

I looked at it two or three times. It was right on the mark where it was supposed to be.

I told her, Emma, there is nothing wrong with that, that's all right. No, it's up too high, it ought to be down there.

I said, You told me you always carried it on 15, didn't you? She said, Yes. She says, That's above 15.

No, it's right on 15. I said, Can't you see it?

She squinted. No, I can't see it.

Go get your glasses.

She said, They don't do me any good.

I was quite shocked. Gee whiz, I says, let's go [76] see a doctor or do something about it. I said, I will make a date and we'll see what's wrong with you.

She says, No don't bother, don't bother, I have been two or three times and they don't do a thing for me.

I said, Well, maybe you haven't been to the right kind.

Well, don't do anything now, I'll let you know if I'll go with you.

I told her I knew a good eye doctor who would certainly tell me what was wrong or what could be done for her.

Time went on. We didn't get anything done. I don't believe I ever did get her to the doctor.

Q. She was unable to see when it was on 15, as you said? A. No, she couldn't see the gauge when she was that close to it (indicating). That is, she could see the gauge, but she couldn't tell when the hand was on it.

Q. You said she was that close. Would you approximate the closeness that you said? You held up your hands, but in distance. A. I'd say 12 or 18 inches.

Q. Away from the gauge? A. Yes.

[77] Q. Did you notice anything with reference to a change in her physical or mental condition? A. Well, I know Emma's had quite a rapid deterioration for a long time. I'd say five or six years she started going down, and it alarmed us. We tried everything in the world to get her out of that house where she wouldn't have to do all the work that she tried to do. We even tried to rig schemes to entice her to do something different.

One time -- well, this was a little before that, she had had some trouble. My brother and I was going to go down the country and see if we couldn't buy a place, thought maybe that would entice her to get out of the house, that she would like, maybe, living in the suburbs. We looked around quite a few times, was unable to find anything that we thought would be convenient enough for her. She couldn't drive and it would have to be some place where she could get to the store and back and forth easy, and that sort of thing, and it was, well, just impossible to find a kind of place like that out in the suburbs.

Q. Did you notice anything with reference to her personal appearance or her memory? A. Emma always wore one style of dress. You couldn't buy anything in the store for her, she wouldn't wear it. And [78] it was all right, we never found any fault with it or anything like that. Anything she wanted, we tried to pacify her by getting it for her.

But towards the last, I'd say in the last year or so she became terrible sloppy. Oh, dirty. You couldn't get her to change and keep clean. It almost set us crazy to see her that way.

Q. Did you notice any change with reference to whether she was argumentative or not? A. Emma was always very aggressive. When Mama died Emma tried to take over as head of the family. If you wanted to do something and you didn't clear with her and asked her first, there was a fuss about it. Especially with the women. Us boys she didn't bother very much. In fact, she would call us and ask us sometimes which was the best thing to do. But with the girls, well, I know two or three times my sister wanted to go away on a trip or something like that, take a vacation. She raised cane.

Q. Who raised cane? A. Emma. She just should not do it, the way Emma thought.

Q. When did your mother die? A. 1945.

[79] Q. Did you notice anything with reference to her memory or any incidents of that kind in later years? A. Well, later years. But at that time her memory seemed to be all right.

Q. Well, that was in '45? A. Yes.

Q. Now, then in '53 or so what was the condition? A. Well, it was awful hard for Emma to make up her mind along in that time. She would tell me one thing, she'd tell somebody else the opposite, and then she would say she didn't say either one of those things.

Q. Would she ever say anything with reference to anybody attempting any poisoning incidents? A. Oh, I have heard that. I wasn't there to hear it, but I have heard it second-hand.

MR. POSTON: I object, Your Honor.

THE COURT: Objection sustained. He said he didn't hear it.

BY MR. MALLOY:

Q. You never heard Emma say anything to you about it? A. Oh, yes, I have heard Emma say that.

Q. Well, that is what I am asking you. A. I see.

[80] Q. Did you hear Emma say it? A. Oh, yes, I have heard her say that.

I don't know whether it was the people nextdoor, told me one time

wanted to give her some food, they were going away or something like that, give her some food for the cats and dogs. And Emma wouldn't take it, she was scared they was trying to poison her cats and dogs.

Q. Did she ever say anything to you or do any unusual bragging about anything? A. That started, oh, a little over a year ago, about a year and a half ago. She would start talking to you and the next thing I know she's forgotten what she was talking about and she's bragging about how good she had done and money she had made and this, that and the other. And then she was talking about somebody, especially this suit. I believe one of the men died, one of the principals died, and she just gloated over that. She got so that you couldn't talk to her very much about any one thing unless you just kept pulling her mind back on that subject all the time.

She would drift off and gloat and brag about nothing almost, you know, just things that had happened.

Q. Recently or years ago? A. Oh, this is recently. I'd say beginning a year and [81] a half or two years ago. That all happened after this suit started on the beach property.

Q. That was in '63? A. Yes.

Q. Now, with reference to the beach property, you say that all the family worked there. Did Emma ever say anything to you about a possible sale of the premises on the Bay Front? A. Yes, she did have a sale for it at \$26,000.

Q. And what did she say to you, if anything, regarding it? A. Well, she told me that she had a sale for the property, a man wanted to buy it and what do I think that she should do. Well, I told her the amount of work and all that we put in that place and the upkeep that was necessary for it, the best thing she could possibly do would be sell it and if she wanted another place let's get another place in a more sheltered condition, that we wouldn't have this continuous work of trying to keep the place up all the time.

It's right out in the water. There is water on three sides of it. It's a neck of land out into the Chesapeake Bay and the waves hit it every direction. And there was always a terrible lot of upkeep to it.

[82] Q. And what did she say then? A. Well, she said, I don't know. She says, You all have put so much work into this place and, she said, I think you all like it. She said, I just wouldn't feel right selling it, no matter what price I got for it, and I think I am going to go on and just keep it as it is because I would like to keep it in the family.

Q. Was anything said with reference, by Emma, with reference to keeping the Bay Front property in the family? A. Yes, she told me she wanted to keep it in the family.

Q. Did she have another piece or was there another piece of property at Deale Beach? A. Yes.

Q. Where was that with reference to the Bay Front property? A. I don't know what direction that is. It's about three, maybe four squares from this piece of property, and it's more on the creek front. There is a creek goes around in back of her property, and it faces on the creek, where her other piece of property faced out on the Bay.

Q. Would you say that 26,000 was a fair price for the Bay Front property? A. [83] Oh, yes, I think so.

Q. Have you any idea of the value of the other piece of property on the Bay? A. It's not worth so much. I would say seven, eight thousand.

Q. Did you have occasion to discuss with your sister the sale of 436 New Jersey Avenue, the property which had been originally bought as the family home? A. How was that again?

Q. Did you have occasion to talk with Emma about the sale of 436 New Jersey Avenue, Southeast? A. You mean recently when she sold it?

Q. Or at any time, if you had any conversation with her. A. Well, we tried to prevail on Emma to sell that property for quite a while back. But in the last year, I'd say January of '65, she commenced to speak of getting rid of it. And later on she got an offer of 35,000 for it, but the

people who made the offer wanted the house furnished as it was and she wouldn't take that. She wanted her furniture.

Emma wanted all cash and I told her she was very foolish to try to negotiate a deal like that for all cash, you won't find one man in a hundred that's got \$35,000 to put [84] up for a house like this. I tried to explain to her how she could handle it and get the most out of it. My words to her were put on mortgage of as much money as you can borrow, probably around 65 or 70 per cent of the worth of it.

Q. Now, then, did she follow on with you or did you -- A. Emma couldn't quite understand what I was trying to tell her. She didn't comprehend how she could put a mortgage on the place and not be held responsible for it.

Q. Did you then suggest that she see anybody or do anything with reference to it? A. Yes. Well, in the meantime I hurt my back. I had a slipped disk and I couldn't get down to see her. I was in bed for six weeks. And I asked Mr. Haynes to go down and see her for me and explain to her thoroughly what I was trying to convey to her.

Q. Is Mr. Haynes a real estate man or a lawyer? A. Yes, he fools around. He handles some real estate for me. He is all the time dabbling in real estate. He has some of his own.

Q. Did she eventually sell the house for \$35,000? A. Yes.

Q. From your knowledge of the property and the market value of 436 New Jersey Avenue during 1965 do you have an [85] opinion as to whether that was a fair price for the property? A. Yes, I'd say under the conditions that she sold it that was a fair price. She could have gotten more.

Q. She could have gotten more? A. Yes.

Q. What do you think would be a fair price to receive for the property? A. Oh, I think she could have got 40,000 for it easy enough.

Q. With reference to these conditions that you have mentioned and based on the facts you have related, do you have an opinion as to whether

or not your sister Emma on July 1st, 1965 was of sound and disposing mind and capable of executing a valid deed or contract? A. Of all the things that happened, I would say no, I don't think she knew what in the world she was doing.

Q. When did you first learn of the existence of the purported will in this case? A. The day after my sister died we went to the undertaker and made arrangements for her burial and so forth, and we made an engagement with Fisher to meet us at the house. He was the only one that had a key, to go over and see if we could find a dress to bury her in.

[86] THE COURT: Suppose we take that up after the luncheon recess. This might be a logical time to suspend.

(At 12:30 p.m. trial stood in recess, to reconvene 1:45 p.m.)

#### AFTERNOON SESSION

BY MR. MALLOY:

Q. Mr. Bailey, I think when we recessed you were saying something about the Bay Front property. I think you said that the Bay Front property was valued at 26,000 and the smaller property in Deale Beach at about \$8,000? A. That is right.

Q. What is the total value of the estate? A. About 70,000.

Q. \$70,000.

With reference to Mrs. Lester, was anything said further about the suit, the law suit instituted in Maryland with reference to the Bay Front property? A. We talked on that many times. There came a time when she was scared that she wasn't going to have money enough to carry through and she asked me if I would help her and I told her sure, anything she wanted that I could give [87] her. And she commenced to get very dissatisfied with Mr. Simmons here, who was her attorney. All you had to do was mention his name and she was ready to explode.

Q. Was that friendly or unfriendly with the explosion? A. Very unfriendly, terrible.

Q. With reference to Mr. Fisher -- or before that, you have stated about the work that you did on the Bay Front property and was rendered by the other members of the family. Did you ever contribute anything other than services or work on the place? A. Oh, yes, lots of times we contributed money. See, the place became very expensive. The upkeep was terrible and it just got beyond her means, she couldn't do it. And Carroll and I, especially my younger brother, contributed quite a little because there were several times which she ordered material and that kind of stuff and then was unable to pay the bill that we paid the bills.

Q. Did you have any conversation with Mr. Fisher? I believe you did say that you learned about the will after Emma's death. A. Yes.

Q. Did you hear Mr. Fisher say anything with reference to this purported will? [88] A. When we were at the house looking for a dress for her, he taken the receipt out of his pocket and showed it to me, signed by Mr. Simmons, for a will and passbooks and I don't know what all was on it. I looked at it and then it dawned upon me that something was happening. And the only thing I said to him about it was, You better hold onto that, you're going to need it.

Q. Was there anything said about any procurement of any papers in connection with it? A. Well, that was later on, when we had this pretrial business. Fisher said he went out and got a blank will, he got his son-in-law and daughter to sign it, but he didn't tell us who wrote it. I don't know who wrote it.

Q. What else did he say with reference to it? A. He got the blank form.

Q. And then you said something after that which I don't think the Reporter got. A. He told us that he had got the blank form.

THE COURT: Who told you that? Who is he?

THE WITNESS: Mr. Fisher. Then he had his daughter and son-in-law come over to the house and sign it.

BY MR. MALLOY:

Q. Did he say where he took it after that? [89] A. He said he had it over at his house.

Q. Did he say where his house was? A. Over in Arlington.

Q. Did he say that he did not notify you about it until after her death? A. Well, I know he didn't, but I don't know whether he said that or not, but I know he did not notify me.

THE COURT: Did he say who typewrote the will?

THE WITNESS: No, sir; no, sir.

BY MR. MALLOY:

Q. When you were at the house when you said there was the discussion and then he told you or showed you a receipt from Mr. Simmons, was there anything, any valuables or anything pertaining to the estate there or discussed? A. We started in looking through her bureau drawer and all, where she kept all her papers, to see what we could find that would be of interest to everybody.

The women were cleaning up the kitchen and so forth, getting food and stuff out that was scattered all around.

Q. When you say the women, if you will explain so that the jury will understand. A. Else, my wife. There was five of us there, two [90] sons, Elsie, my wife and myself. They started cleaning up, the house was in right bad shape.

And Fisher says, I can't find her insurance papers. So we started to look through, thought maybe we could find something, we didn't know what would turn up. That is when he showed me the receipt for the stuff that he had carried to Mr. Simmons, which maybe a half-hour had gone by then.

Well, when we seen that we figured, well, what the heck is the use of us looking if he's already carried everything out of here.

And there was a case under the bed. He says, That's Emma's so-called jewelry case, I think you better take it out of here, it might cause somebody to break in.

We had to leave, we didn't have very much time to spend there, we had to get back to the undertaker, and we all went out the house and started to lock up, and my oldest son says, Why don't you get that case and take it?

I says, Well, I wouldn't want to disturb anything here until I have responsibility to do it, authority to do it.

He said, Well, they have taken everything else, I'm going back to get it, I will take it home if you won't take it.

MR. POSTON: Objection to that, Your Honor. That [91] is hearsay.

THE COURT: With whom was this conversation?

THE WITNESS: Between my son and myself.

THE COURT: Objection sustained.

MR. MALLOY: That was just with reference, if Your Honor please, to the last thing where he says --

THE COURT: I understand, but it is a conversation between the witness and his son. If it was a conversation with Fisher I would have admitted it.

Objection sustained.

MR. MALLOY: The conversation with Fisher, the portion with Fisher is all right?

THE COURT: Yes, but this last is a conversation with his son, so I will sustain the objection.

BY MR. MALLOY:

Q. Now, then, as a result of the conversation with your son, not what was said, was anything done with reference to this jewel case?

A. My son went back and got the case and put it in the back of my wife's car.

Q. And then it was taken, and that was -- A. We opened up the case. We all went back and opened up the case to see what was in it. There was a lot of [92] antique jewelry; oh, I guess about ten or twelve

dollars worth of pennies; there are some stones in there, maybe diamonds, I don't know. They may be rhinestones or diamonds, I couldn't tell you.

Q. Do you still have the box and its contents as it was then? A. Exactly as it was, yes.

Now, there was a little case in there that Emma used to keep in her bureau drawer and it had a good many gold pieces in it. She had a double handful of gold pieces that we all have given her during the years. She liked to save them. It had been broken open and I don't think there was anything in it that I remember.

Q. That is when you were looking through the house? A. Yes.

Q. Was that case taken or left there? A. It was inside of the so-called jewel case and it stayed there. It's still in it.

Q. On a prior visit to your sister while she was at S Street did you have occasion to observe any bills or money other than the gold pieces which you have mentioned?

THE COURT: I wonder how this is relevant to the issues of this case.

[93] MR. MALLOY: I guess it may well be Your Honor is right. You may cross-examine.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. Mr. Bailey, you made some mention of Mrs. Lester's eyesight. Isn't it a fact that she did read the newspaper up to the time she -- A. Recently what?

Q. Isn't it a fact that she continued to read the newspaper up until a short time before her death? A. She could read some of the headlines with a magnifying glass.

Q. She did have a magnifying glass? A. Oh, yes, she had a dozen of them.

Q. And she used to tell you newspaper stories she read in the

newspaper, did she not? A. She didn't read no newspapers. She could read the headlines and she listened mostly to the radio.

Q. She had a newspaper delivered to her house, did she not? A. Newspaper? Yes, sure.

Q. Over the years you and Mrs. Lester had disagreements, [94] did you not? A. I can't understand you very well.

Q. Did you and Mrs. Lester over the years have disagreements? A. Disagreement?

Q. Yes. A. When, for what?

Q. For anything. A. No.

Q. Did you have arguments? A. No.

Q. You got along very well with no arguments whatsoever? A. That's right.

Q. Didn't you complain to her about the way she dressed? A. When she what?

Q. The way she dressed? A. No. Emma was my sister.

Q. Did you complain to her about the way her house looked? A. I never said anything to her much about the way the house looked, but it was terrible.

[95] Q. Well, didn't you let her know that? A. I have let her know in this way: Emma, why don't you get rid of some of this stuff here so you could clean up? It's impossible for you to clean it with this littered all over the place, old newspapers and string and --

She saved everything, furniture. You had a passageway from her bedroom to the kitchen about that wide (indicating). You had to really walk a chalkline to get through.

Q. And you were after her all the time to clean the place up, were you not? A. Most every time we were around there we would say something about it, not a whole lot. She resented it a little bit.

Q. And you complained about that dog being in the house all the time, didn't you? A. I never complained about that dog one time in my life.

Q. Didn't you suggest that she put the dog in the kennel at one time?  
A. I suggested that if she would take a trip, take a little vacation, we could put the dog in the kennel to keep it.

Q. Did you want her to go on a world voyage with [96] your sister Elsie? A. Want to do what?

Q. Did you suggest that she go with your sister Elsie on a world voyage? A. I suggested that she take a trip with Elsie, that it would be company for one another and Elsie could look out for her a good bit.

Q. She wasn't interested in taking this world voyage, was she?  
A. Oh, I don't know as she wasn't interested, but she just couldn't possibly see how she could be away from the house. In fact, one time I was talking to her about it and she says, You know, I just got to be in this house when nighttime comes.

Q. Now, with regard to her relations with Marie, were they on good terms at the time of her death? A. Were they on good terms? They hadn't been for some time, no.

Q. As a matter of fact, they hadn't spoken to each other for over 12 years, is that correct? A. I don't believe so, no.

Q. In your testimony you have made several references to her saying this beach property was for the family as a [97] whole, is that correct? A. That's right, yes.

Q. She never made any mention of that after she broke off with her sister Marie, did she? A. Oh, yes, yes, sure she did. She still said that was for the family. Always. I never heard her say anything else.

Q. Is it your testimony that it was her intention to leave part of that beach lot to Marie, the one she hadn't spoken to for 12 years? A. I don't know what was in her mind regarding that, but she never specifically separated Marie from it.

Q. Well, now, on this beach property that you have been speaking of, you have mentioned that you have contributed work and money and so forth. How much money did you ever contribute to that beach property? A. That would be hard for me to say because I never kept any

track of it. Two or three different times I paid for loads of stone coming in which were anywhere from \$150 to \$175 a load.

Q. Did you at any time present Mrs. Lester with a bill for this?  
A. No. Emma got the bills, I gave her the money to [98] pay for it.

Q. Well, did you ever present a bill for the money you had paid on this property? A. No. Anything that I gave Emma, that was all right. We just forgot about it.

Q. In other words, there was no debt that she owed you, was there?  
A. No, no, we never put a claim against her for any. We all had the pleasure of the place and we contributed.

Q. You used that property for years, you and your family, as a resort, did you not? You spent many -- A. You mean exclusively just us?

Q. No, but you and your family did use it as a resort area in the summer, did you not? A. Oh, we went down there quite often. I tell you we went down there to work more than we ever did for pleasure.

Q. Yes, but didn't you have a lot of pleasure down there? A. No, sir.

Q. It was all hard work? A. It was hard work from the beginning to end. I think I went fishing two or three times the whole time that she had it.

[99] Q. And you and your family had no enjoyment at all down there? A. Yes, we enjoyed being in with the rest of the people down there. We enjoyed working on it.

Q. You enjoyed the work itself? A. Yes, we got as much enjoyment out of working on it as we did any of the facilities, the conveniences.

Q. As a matter of fact, did you personally do any work on the wall the sea wall around that property? A. On what? Oh, Lord.

THE COURT: I wonder --

THE WITNESS: I don't know how to tell you where we began and ended.

THE COURT: Is that relevant?

MR. POSTON: I don't think it is, Your Honor. It was brought up on direct and I thought I better cross examine him.

BY MR. POSTON:

Q. Over the last several years, Mr. Bailey, did Mrs. Lester visit at your home? A. Not a whole lot. The last several years you couldn't get her to go anywhere.

Q. As a matter of fact, she was never in your house [100] during the last two years of her life, was she? A. In the last two years? I believe she was once.

Q. And as a matter of fact, over those two years, she didn't visit with her other sister either very much, did she? A. No, she wouldn't go anywhere. She wouldn't go far from the house.

She used to go around a good bit. She used to come to my house, well, even with the rest of them. She used to visit quite often.

But seemed like after this suit started down there she went to pieces. She didn't want to go no place.

We used to go out to the theater in the evening and dinner --

Q. You have answered my question.

With regard to the property at New Jersey Avenue you have testified as to the price that she got for this property of \$35,000 cash. Now, you mentioned that you thought the property could have brought \$42,000 is that correct? A. No, sir, I didn't say nothing about 42,000.

Q. Or 40,000? A. I would say she could have gotten close to 40,000 for it.

Q. And she could have gotten less than 35,000 cash, [101] too, could she not? A. Oh, anybody could do that. Sure.

Q. When you were advising her before she sold that property you had no idea that she could get \$35,000 cash for that property, did you?

A. Yes, I did, because she already had an offer for that.

Q. Cash? A. Yes, but the purchasers wanted all the furniture and everything that was in the house.

Q. And at that time you were advising her to put a trust on that property? A. Yes, that is right.

Q. And did you realize at the time she would be liable for the payment of that trust? A. To a certain extent, that's all; the same as any of us are when we buy a piece of property.

Q. In other words, when the owner of the property puts a trust on the property, even if he sells it and someone assumes it, the responsibility is still with the one who put the trust on there, isn't that correct?

A. No, the property is usually --

THE COURT: I think you are asking for legal [102] advice, legal opinion. There are various ways of handling a transaction of that kind.

BY MR. POSTON:

Q. This building that she sold for \$35,000 cash is just a little row building, isn't that correct? A. A row building? Yes.

Q. About 18 feet wide? A. I don't know as I ever measured it. It probably would be a little more than 18 feet, I think.

Q. It needed restoration, did it not? A. Yes, it needed a good bit of work on it. It was all firm construction and everything of that kind. It was just the cleaning and painting and stuff of that kind needed to be done.

Q. You mentioned a lawyer or a real estate man by the name of Mr. Haynes. Is he any relation to you? A. Yes.

Q. What is he? A. Brother-in-law.

Q. And is he a lawyer? A. I don't know to what extent he is qualified to practice law. I couldn't tell you that.

Q. You did send him to see your sister to advise her [103] on this transaction? A. Yes.

THE COURT: I understood that he was a real estate man rather than a lawyer. That is the way he was described, I thought.

MR. POSTON: I believe Mr. Malloy asked if he was a lawyer or a real estate man.

THE COURT: I thought the witness said real estate man.

MR. POSTON: I think that is what he is, Your Honor.

BY MR. POSTON:

Q. You mentioned in your direct testimony, Mr. Bailey, that Mrs. Lester was dissatisfied with Mr. Simmons at one point of her litigation concerning the beach property, is that correct? A. Oh, yes, yes, she was bitter against him.

Q. And that was after the trial, was it not, and while she was waiting for a decision of the Court? A. That was, it seems to me, all during the thing. I don't remember exactly when she started off disliking him, but as far as I can remember, every time I talked to her all you had to do was mention his name if you wanted to hear some cussing.

[104] Q. Wasn't it a fact, Mr. Bailey, that this was during that long wait when she was waiting to find out whether she won the case or not? A. No, it was before that because she asked me, You live out in Maryland, can't you get me a good Maryland lawyer to take this thing over.

And I tried to talk to her and I said, Well, Emma, I don't know whether you should do that or not, you have already got this man and it may look bad if you change lawyers. I don't know how to advise you, I would rather you talk to another lawyer.

And I says, I don't know a lawyer in Maryland, but I do know people who do and I will be glad to get one of them for you.

Q. As a matter of fact, through his services she won this suit, did she not? A. She what?

Q. She won the case, didn't she? A. Oh, yes, it was rendered in her favor.

Q. And then after that she was quite pleased, was she not? A. For just a little while, and they made an appeal and Emma just went right to pieces.

[105] Q. But I mean after she won the case she thought more of Mr. Simmons than when she was waiting for this decision to be handed

down, did she not? A. She never told me so. Maybe she did, but she never told me that.

Q. Mr. Bailey, you have testified to some extent on your opinion as to Mrs. Lester's mental competence.

You thought she was mentally competent on July 21st, 1965, did you not? A. July 21st?

Q. That is when she was negotiating for the headstone for the family grave site for which she paid. You thought at that time she was competent, didn't you? A. I don't think I expressed an opinion on that at all.

THE COURT: This witness didn't testify about that. Mrs. Pinney testified about that. At least that is my recollection.

MR. MALLOY: That is right.

MR. POSTON: Well, what I am asking, Your Honor, now if now in his opinion he did not think she was competent on July 21, 1965.

THE WITNESS: I can't remember anything of that kind that I said anything like that. Maybe she might have been, [106] I don't know.

BY MR. POSTON:

Q. Do you remember when your deposition was taken on December 3rd, 1965? A. Yes.

Q. And you were under oath then, just as you are now, is that correct? A. That I was what?

Q. You were under oath at that time? A. Yes, sure.

Q. I refer to page 45 of this deposition. Do you remember Mr. Simmons asking you about this transaction where she bought the headstones? A. Yes.

Q. And so forth. And you told him that you were familiar with the --

THE COURT: I think you better --

THE WITNESS: That is right, I was familiar with it.

THE COURT: Just a moment.

I think you better read the exact questions and answers, rather than paraphrasing them.

THE WITNESS: Do you want me to tell you what I said?

MR. POSTON: No, there is no question pending [107] right now.

BY MR. POSTON:

Q. Now going back to page 43:

"Now, Mr. Bailey, you are looking at a paper there which has been marked for identification as Caveatee's Exhibit No. 3, and I will ask you have you seen that document before? That is a photostatic copy.

"A. Have I seen it before?

"Q. Yes.

"A. Yes.

"Q. What does that pertain to?

"A. Well, this was for the stone out there in the graveyard.

"Q. Do you see that date there of that paper, the date when --

"A. Twenty-first of July.

"Q. 1965?

"A. Yes.

"Q. And Mrs. Lester signed that contract?

"A. Yes. I would think so. I think that is her signature.

"Q. Were you with her when she was making these [108] arrangements?

"A. No. I think my wife was.

"Q. Who prepared the dates for those markers, for instance, Mary Bailey, July 12; Mary P. Bailey, born July 12, 1854, and died March 14, 1945.

"A. I don't know.

"Q. Now, this agreement here pertains to certain monument stones, did you talk with her about these stones?

"A. Yes.

"Q. Were you with her when she signed the contract?

"A. No.

"Q. When did you talk with her with respect to July 21, 1965, when this document was executed?

"A. You mean in regard to this now?

"Q. Yes.

"A. I talked to her several times before this.

"Q. How close to July 21st? You notice, if you look at this, Mr. Bailey, again, it is dated July 21, 1965. Now, my question is, with regard to the agreement which she signed there, pertaining to the grave markers, when did you talk with her about that transaction?

"Mr. Malloy: He said sometime before that.

[109] "Q. At or about that time?

"A. I can't give you no specific date.

"Q. At about what time did you talk to her about that?

"A. Well, she talked to me about this on several different times. As much as I would say, six months before any of this.

"Q. Now, did she talk with you again about it at the time she made the transaction or consummated the transaction?

"A. Yes. She talked to me about it.

"Q. And she seemed to want to do that, is that right?

"A. Yes. That is right.

"Q. And did she pay for that out of her own funds?

"A. Yes.

"Q. You didn't pay anything on that?

"A. I haven't paid anything, no.

"Q. Did Mrs. Lester, when you were negotiating that transaction with her or when she was discussing it with you, did she appear to be mentally competent to do that sort of thing?

"A. Yes. I would say so. I didn't notice any [110] particular thing that I can think of right now that was wrong."

Now, was that your answer on December 3rd, 1965? A. More than likely it was.

Q. Was that the truth? A. I couldn't say anything that I didn't say that.

Q. Well, was that the truth? We want the truth here today. A. All of that's the truth.

Q. Was that the truth? A. Yes, everything you have said there is true.

Now, I also said something else that you don't have in there.

Q. There is no question pending now.

MR. MALLOY: If Your Honor please, I think that that point, since the witness says there was also something else, and I think the next question on that line where he was reading --

THE COURT: You can read that on redirect examination if you wish.

BY MR. POSTON:

Q. Mr. Bailey, weren't you over at Mrs. Lester's house two or three weeks prior to her death on a matter of a doorbell? [111] A. I was there a little before that, probably two or three weeks, and then about ten days before her death -- before she was taken sick.

Q. She seemed to be all right at that time, did she not? A. No, no.

Q. I refer to page 15 of your testimony of December 3, 1965:

"Q. Now, this was approximately two or three weeks prior to her death you were there regarding the doorbell?

"A. Yes.

"Q. Did you talk with Mrs. Lester on that occasion?

"A. Oh, yes, sure.

"Q. How did she appear to you to be that day?

"A. She was fairly well, with the exception that she was kind of slow answering or making up her mind. I never thought anything of it at the time, but I did think since then, that it had a bearing on her condition that she and that I didn't realize.

"Q. Did she answer your questions that you asked her?

[112] "A. Well, yes, but --

"Q. Did she answer them intelligently?

"A. Well, I would say somewhat, yes.

"Q. Did she answer any questions that you considered were not intelligent answers?

"A. Well, that is right difficult for me to answer. I know after we left, Raymond and I talked coming back, and there were several things that we commenced to think about that we didn't realize at the time."

Was that the truth, the answers that you gave at that time? A. I think they were pretty near the truth. I know we didn't realize the significance of what Emma did say. I don't believe Emma sat down once in an hour and a half that we were there. She just kept on the go and, you know, you don't notice these things, you don't think about them until afterward.

And if you said something to her, she would stare and stare and just as if she couldn't comprehend what you were saying. But we don't think anything of it at the time.

Q. In other words, it didn't occur to you that she was of unsound mind until you found out the terms of her will, [113] isn't that correct? A. I wouldn't say that; but I am not a doctor and I couldn't tell you even if she was unsound mind at the end.

It's my opinion that she was of very unsound mind from her actions and her talk and everything of that kind. She had changed so much from what she used to be.

Q. Did you see her on the date she executed the will, July 1, 1965?

A. Did I what?

Q. Did you see her on July 1, 1965? A. No, I did not.

Q. You don't know whether she was of sound or unsound mind on that date, do you? A. No, I couldn't tell you at that specific minute, no, sir.

Q. Did you ever recommend to her that she have a psychiatrist examine her? A. Have what?

Q. Did you ever recommend that she have a psychiatrist examine her? A. No, I didn't. I guess I was very lax on that, that I didn't realize that she did need something of that sort.

Q. Did you ever indicate to her that she should be [114] committed to a mental institution? A. No, sir.

Q. Did you ever indicate that to anyone? A. No.

Q. How long have you known Mr. Fisher? A. Oh, I would say around 20-some years. I first met him at the beach place. He used to drive Emma's car --

Q. My question only was how long have you known him. So you have known him -- A. I'd say 20 to 25 years.

Q. And during this time, to your knowledge, did he do all kinds of chores that you can think of for Mrs. Lester? A. In the later years, in the last three or four years he done a good bit. Before that, about the most thing that I knew he ever done was drive her car. He may have carried in some coal for her or painted something or something like that, but nothing to any great extent.

Well, he wasn't capable of doing a whole lot. He was more trifling than anybody I had ever seen.

Q. He was trifling, you say? A. Yes.

Q. You had a very good opinion of him until she died, did you not?

[115] A. I had a good opinion of him because he was relieving me of many things that I would have had to have done myself for Emma that he relieved me of having to go over there and do it.

Q. You were glad that he was around, were you not? A. I certainly was. I was glad for anybody to give a hand. When you get up to be 70 years old you don't run around like you used to.

Q. Up to the time that Mrs. Lester died you had the greatest respect for Mr. Fisher, did you not? A. I what?

Q. Up to the time that Mrs. Lester died you had the greatest respect for Mr. Fisher did you not? A. Yes, I didn't know anything bad about him.

I tell you, I don't believe I have spoke two dozen words to Mr. Fisher since I have known him.

Q. But you still had a great respect for him? A. I thought he was all right. I thought he was doing a good job helping to look out for her.

Q. Did you ever see him working down at the beach? A. Oh, yes, he worked along with us.

Q. Did he work on that sea wall? A. Oh, yes, he worked on the sea wall some.

[116] Q. He worked on the sea wall for many, many years, did he not? A. Yes, you could call it many years. We all worked on it many years.

Q. Did you know of a prior will that Mrs. Lester had? A. I never saw it. I know she had other wills.

Q. And you had heard about what was in the will? A. The only thing I know is what Emma told me.

Q. And that was with reference to what will? A. Well, that was a will that I believe was made about the time she went in the hospital for a cancer operation.

Q. And didn't she tell you that she was leaving the beach property to Mr. Fisher? A. No, sir.

Q. What did she say was in that will? A. She says, Walter, look out for me; if I die, please see that I am buried in the Cedar Hill lot. And says, You're not going to want; in fact, the family ain't going to want very much after I am gone, I am going to help an awful lot.

Q. Did she at any time ever tell you what she was leaving you in her will? A. No, nothing specific.

[117] Q. Did you ever ask her -- A. I wouldn't talk to her about that. When she tried to talk to me about it I told her I didn't want to hear anything like that from her.

Q. Did you ever make any suggestions the way she should make her will? A. No, I don't think I did.

MR. POSTON: No further questions, Your Honor.

THE COURT: Any redirect examination?

REDIRECT EXAMINATION

BY MR. MALLOY:

Q. With reference -- you started to say something after Mr. Poston had asked you the question, and I am reading another question where he stopped reading:

"Q. And you will bear in mind, Mr. Bailey, that that document" -- This is on page 45, if Your Honor please.

"And you will bear in mind, Mr. Bailey, that that document there was executed just three weeks after the will was executed."

And then at the top of page 46 the answer by you:

"That is all right. She had spells. She wasn't always off."

Is that what you said? [118] A. I think I said that, yes.

She wanted to put a stone upon the lot. The lot had been provided by my sister Elsie and Carrol and myself --

THE COURT: I think you have answered the question.

BY MR. MALLOY:

Q. And then the next question was, at the top of 46:

"Q. When did you ever see her when she was off?

"A. Well, I mentioned that as much as almost a year previous."

Now, on this occasion when you said that you went down with the doorbell, when you said she was walking around and did not sit down while you were there approximately an hour and a half, you said Raymond was with you? A. Yes, sir.

Q. Is he your son Raymond? A. That is right, yes.

Q. Would you state now as to whether or not in your opinion she was of sound or unsound mind at that time? A. I think she was a great deal worse off than either Raymond or I realized.

Q. Was she, in your opinion, at that time not capable of executing a valid deed or contract? A. I don't think she was capable, no.

[119] Q. When you stated that the family was not going, or that Emma had told you that the family was not going to want for anything after I am gone, and you said when she was going to the hospital, is that when she was going to the hospital for the cancer operation? A. No, this was after that.

Q. After that, later? A. Yes, later.

Q. She went for the cancer operation in 1952. When was this? A. She asked me then if anything happened to her to see she was placed in a lot in Cedar Hill, the family plot. But after that she talked about the will.

She tried to talk to me two or three times about it. I didn't want to listen to it. I told her several times, I said, Look, spend some of your money and get a little rest and have a good time off of it. I said, It's no fun being the richest person in the graveyard, that don't do anybody any good.

Q. Is that when she told you that the family was not going to want for anything when -- A. Yes. Oh, she told me that two or three times.

Q. Was that subsequent to 1952, after? [120] A. That's right, that's later on.

MR. MALLOY: That is all.

MR. POSTON: I have one question, Your Honor, if I may.

#### RECROSS EXAMINATION

BY MR. POSTON:

Q. With regard to your wanting, Mr. Bailey, you have never wanted in your life, have you? A. Did I ever want?

Q. You said she was going to save you from want.

You are a pretty well to do man, are you not? A. Mister, we grew up --

Q. Please answer my question. A. Yes, we did. We didn't know where the next meal was coming from for years.

Q. But when she said you will be free from want, at that time you were financially independent, were you not? A. I couldn't tell you. I was better off than I was before, I will say that.

Q. You mentioned that Mr. Haynes handled your real estate transactions, is that correct? A. Yes.

Q. You own quite a bit of property, do you not? A. Well, I don't [121] know what you call quite a bit. I own some.

THE COURT: What was your occupation?

THE WITNESS: I am an engineer with Central Armature works.

MR. POSTON: No further questions.

#### FURTHER REDIRECT EXAMINATION

BY MR. MALLOY:

Q. With reference to a question that he has asked, did you have any property or did either your sister Elsie or Marie have any property at the beach? A. No, no.

Q. The only properties at Deale Beach were the two pieces of property that belonged to Emma? A. That's right.

Q. Do your sisters Marie or Elsie have any established funds of their own or any --

MR. POSTON: Objection, Your Honor.

THE COURT: I think that is irrelevant, really.

You may step down.

[122] MR. MALLOY: Mr. Raymond Bailey.

#### RAYMOND H. BAILEY

called as a witness, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name? And keep your voice up so

that the ladies and gentlemen of the jury can hear you. A. My name is Raymond H. Bailey.

Q. Where do you reside, Mr. Bailey? A. 13315 Norden Drive, Wheaton, Maryland.

Q. You are the son of Walter Bailey, one of the caveators in this case? A. Yes, sir.

Q. Emma O. Lester was your aunt? A. Yes, sir.

Q. How closely were you associated with your aunt during her lifetime? A. I would say reasonably closely associated. I did a number of jobs, such as servicing her radios, televisions, and such, which years ago was my trade.

THE COURT: I think you ought to keep your voice [123] up. Some of the jurors who have to hear you are quite a distance away from where you are seated.

THE WITNESS: I would take care of some odd jobs for her, like servicing her radios, televisions, and such. At one time or another I have painted the kitchen for her in one of her apartments.

In recent years I helped in the time that she moved, I furnished my truck and my time on two or three occasions, both to carry furniture and household effects to the S Street residence and also down to Deale Beach.

BY MR. MALLOY:

Q. Where had she lived prior to moving to the S Street residence? A. 436 New Jersey Avenue, Southeast.

Q. Did you have occasion to see the condition of the house and also the condition of your aunt during the years -- A. Yes, very definitely.

The house resembled more a storeroom of different items, such as furniture, refrigerators. Oh, there was a couple of television sets down there, old radios. Gosh, about anything you would ask she had.

Q. Was it in a clean or unclean condition? A. It was always very difficult to walk through the [124] area and it was never in a really clean condition, what I would consider to my way of living.

Q. Would you consider it a dirty condition? A. Yes, sir.

Q. With reference to your aunt's personal appearance, did she appear to take pride in her appearance, or otherwise? A. Very rarely did I ever see her really clean in her dress and such, bed clothes and what have you.

Q. Did you ever hear her or have any conversations with her about any actions or conduct on behalf of the neighbors? A. One particular thing I remember very well was during the period that we were moving her. I double parked my truck in front of the house and I heard her mention to me that she probably figured the neighbor up the street, the front door was open but the storm door was shut, He's sitting up there looking out his door at me to see what I have.

Q. Did she say anything about anybody attempting to poison anything? A. There was an occasion where a neighbor nextdoor, a young lady, she and her husband had had a steak dinner and they --

MR. POSTON: May I interrupt a moment to find out whether --

[125] THE COURT: No, let him finish the answer. If it is objectionable you can move to strike it.

BY MR. MALLOY:

Q. Was this conversation with Emma what Emma told you? A. Well, she had mentioned that the ones nextdoor she thought were trying to poison her dog, they brought some old steak over there to give him.

Q. Was there any other incidents that you can recall of things that she had said there? A. Well, generally whenever we would go down to visit with her she would go through sort of a round-robin. We would start on one subject and explore it and go around and around and go through it again, at least. It would be discussions like on the beach property, where she had had some trouble and particularly some of the people in the area, at Deale, that she thought were trying to get the best of her and she thought she had gotten the best of them, and she was really adamant about it that she was better than they were.

Q. Did she mention any particular names about it? A. She did,

but I could not honestly tell you what they were.

Q. So that it was, in a sense, repeating these things over and over again? [126] A. Yes, sir, definitely.

Q. Did you notice any change in her memory or any forgetfulness? A. Only to the extent that she could not dwell on any one subject very long before she would slip off into something else.

Q. Based on the -- with reference -- did you have occasion to do any work or assist in any way on the bayfront property at Deale Beach? A. Well, this goes back many, many years because she had the bay place from the time that I was a youngster. I have helped build a pier; oh, I guess it was something like 25 or 30 foot long. I remember the situation well on that one because I became very exhausted about the middle of the day after working on it in the hot sun and I more or less collapsed.

Q. Did you notice anything with reference to her attitude or condition at the time there was litigation regarding the beach property about 1963? A. Ask that again, if you would.

Q. About 1963 did you notice anything or say anything with reference to the beach property and a suit which had been filed in connection with it? [127] A. Yes. There was a suit filed for a right-of-way for a road that was to go all the way to the beach front, and she maintained that the right-of-way was not legal inasmuch as she -- well, I always assumed, in my opinion, anyway, that she had been there by the right of, oh, what would you say, time or precedence.

Q. Was she upset or otherwise with reference to that matter? A. She was very upset about it. She stayed continually stirred up about it.

Q. Did she ever say anything to you with reference to Mr. Fisher?

You stated that you had used your truck and helped with her moving from 436 New Jersey Avenue, Southeast, to the 1525 S Street, Southeast property. Did anyone else do any work in connection with that? A. Mr. Fisher worked with me, or I worked with him, whichever way you want to call it.

Q. Did your Aunt Emma say anything to you with reference to payment to Mr. Fisher? A. She always maintained that she paid him for everything he did.

Q. Did she say anything about payment of an amount [128] for that? A. I believe there was a payment of \$250.

Q. Did she offer you anything -- that was to Mr. Fisher? A. Yes.

Q. Did she offer you anything? A. She offered me \$50 for helping to move her, and I told her very frankly that was a nephew of hers, I didn't feel that paying me was proper, and I would not accept it.

Q. Did she state to you that she had paid Fisher for everything he did for her? A. Yes, sir, she had.

Q. Based on the facts you have just related do you have an opinion as to whether your aunt on July 1st, 1965 was of sound and disposing mind and capable of executing a valid deed or contract? A. I would say it would be very doubtful that she could execute a sound will.

Q. What would be your opinion, that she could or she could not? A. She could not.

THE COURT: He has answered the question. He said doubtful. We will suspend. I want to take up another short [129] matter and then we will take our mid-afternoon recess. The jury may be excused at this time.

(Recess.)

THE COURT: You may proceed.

BY MR. MALLOY:

Q. Mr. Bailey, with reference to the visits to your aunt, will you state whether or not you ever observed anything with reference to her eyesight? A. It's been the best part of a year ago. I was down at the Capitol on business for the newspaper that the wife and I are involved in, in Mac Mathias' office. It was the kick-off for his campaign for re-election. I stopped by in Aunt Em's house because it was close by. When I came in the yard she was coming out of the basement and I walked up to her and I said, Hi, Aunt Em, and she didn't respond. And

then I had to get almost within that close to her (indicating), and I said, Aunt Em, it's Ray. And she didn't recognize me until that point.

Later on, after she had moved -- and of course I have been observing this over a period of time -- the eyeball itself, I used to think to myself if mine is going to get this way when I get old, gosh, I don't know what I am going to do. It was getting cloudy.

[130] THE COURT: Will you read the question, please?

(The Reporter read the last question.)

THE COURT: When was this incident concerning which you testified?

THE WITNESS: Which one, sir?

THE COURT: Read the answer.

(The Reporter read the last answer.)

THE COURT: Did you testify about two different occasions?

THE WITNESS: Yes, sir.

BY MR. MALLOY:

Q. So that the first instance was about a year, approximately a year ago? A. Yes, sir.

Q. And that is when she was residing at 436 New Jersey Avenue, Southeast? A. Yes, sir.

Q. And later the condition which you observed about the eyeball itself was after she had moved to the S Street house? A. Yes, sir.

Q. And she moved to the S Street house sometime around April or May of 1965? [131] A. Correct, sir.

MR. MALLOY: You may cross examine.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. How often did you visit in the S Street house, Mr. Bailey? A. Oh, during the period that she lived there I would say on an average of once to one and a half times a month.

Q. Every day she received the daily newspaper, did she not? A. I would assume so. I didn't check on that.

Q. She read the newspaper, did she not? A. I don't know how she could, to be very honest with you.

Q. Did you ever see her magnifying glass? A. Yes, sir, I did.

Q. Have you seen her read with it? A. Yes, sir, I have.

Q. And she did read? A. With the magnifying glass, but this was at New Jersey Avenue, this was not at S Street.

Q. Mrs. Lester was very fond of you, wasn't she, Mr. Bailey?

[132] A. I think so.

Q. She was fond enough to leave you \$3,000 in her will? A. Yes, sir.

Q. You saw nothing irrational about that, did you? A. I feel the same about that as I did about the price for moving her. The money doesn't mean that much to me, to be very honest with you.

Q. In other words, the fact that she liked you and she did leave that \$3,000 to you, there is nothing irrational, is there, to that, would you say? A. I don't guess so.

Q. In other words, she could pick the people -- I mean the people that she liked. You knew she liked you, did you not? A. As I say, I am sure she did. There are a number of other reasons.

Q. She liked you better than other members of your family, did she not, to your knowledge? A. To my knowledge, I can say so.

Q. You were her favorite, weren't you, among the family? A. I have heard it referred to that way.

Q. She had many complaints about her other members of [133] her family, did she not? A. Well, there wasn't just family. She could complain about most anyone.

Q. But I mean the family, she had quite a few complaints about your father and about your -- A. Never about my father, no.

Q. About her sister Elsie and sister Marie, did she not? A. I have heard her mention both sisters.

Q. And complain about them? A. Yes, sir.

Q. And complain about their inattention to her, isn't that right? A. Well, she has probably said it was inattention, yes, sir.

MR. POSTON: No further questions.

#### REDIRECT EXAMINATION

BY MR. MALLOY:

Q. As a matter of fact, she complained many times about something one had done while the other was there, is that not true? A. That is correct.

THE COURT: You may step down.

THE WITNESS: Thank you.

[134] MR. MALLOY: Mrs. Bailey.

#### BEBE BAILEY

called as a witness, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name? And try to keep your voice up so that all the members of the jury can hear you. A. I am Bebe Bailey.

THE COURT: What is your first name?

THE WITNESS: Bebe, B-e-b-e.

BY MR. MALLOY:

Q. Where do you reside, Mrs. Bailey? A. I reside at 13315 Nor-  
den Drive in Wheaton, Maryland.

Q. What relationship do you bear to the deceased? A. I am mar-  
ried to her nephew, to Raymond Bailey.

Q. Who just testified here? A. Yes, sir.

Q. How closely were you associated with Emma Lester during her lifetime? A. I would say very close. I was probably in her confidence very much.

Q. When did you become a member of the Bailey family by marriage and consequently by marriage to Mrs. Lester? [135] A. Twelve years ago, when I married Raymond.

Q. That would be 1954? A. Yes, sir.

Q. Directing your attention to your visits with Mrs. Lester of conferences with her since your marriage, will you state what, if anything, you observed with reference to either the appearance of the house or her appearance and any change that you may have noticed since that time? A. Well, she lived in the basement of a house and it was very dirty and very unkempt. We used to go down, when we first got married, quite a lot, and I didn't have any children at that time and it didn't bother me very much, but after I had children and the place got dirtier I didn't go down quite as much because the dogs sort of had the run of the house and they would jump on my one-year old and they were much bigger and knock her down.

But it was just a place that you didn't want to take a small child.

THE COURT: Mrs. Bailey, everyone has to grasp what you are saying, so don't go quite so fast.

THE WITNESS: I'm sorry.

THE COURT: Some of the jurors are quite a distance away from where you are seated and we all have to grasp what [136] you are saying.

THE WITNESS: Yes, sir.

BY MR. MALLOY:

Q. Now try to go slower and, if you will, could you repeat slowly what you have said? A. Yes, sir. When we first got married we went down quite a lot, but gradually the house -- even when I first went there I was very shocked because it was very dirty. It had been my first knowing of Aunt Em. But after a while it got dirtier and the dogs had the run of the house and when my child was born after three years of married life and I took it down there and the dog had the run of the house, it would jump on her and lick her face and so forth.

I didn't go down quite as much and we took the children down even less after that, but I continued to go see her in the house.

I am sort of an interior decorator by trade and it was just pitiful, it really was pitiful.

Q. You are an interior decorator? A. Yes, I am. I am a newspaper editor and publisher and I am an interior decorator by trade.

Q. So that it made a bad impression, I take it, the appearance of the place? A. Yes, sir, very much.

[137] Q. Did you observe anything with reference to the appearance of Emma Lester herself as to cleanliness? A. Yes, sir. As a matter of fact, I owned a fabric shop at that time and I gave Mrs. Lester material to have clothes made because she stayed in about one dress all the time. I took them up to her seamstress, had them made for her. And she had them made one pattern all the time, one way, and this was no problem because she had an old dress and that is the way she wanted them and wanted them no other way.

So I sent material to her dressmaker and had them made for her, and also her underpants. She would wear one kind and no other, and I would have her underpants made because she couldn't buy any like them.

Q. Then what would you say with reference to whether she was clean or unclean? A. Well, I'd call it unclean.

Q. Did you notice anything with reference to her conversations later, after '54, any change in the matter? A. Well, she would ramble an awful lot about the same things over and over and over again. Stories she'd tell you one time she told you every time you went down there or every time you were on the telephone. Sometimes they were a little exaggerated.

[138] Q. Would she repeat things? A. Yes, sir, over and over and over again.

Q. Mrs. Bailey, did you ever have any conversation with Mrs. Lester with reference to a Mr. Raymond Leon Fisher? A. Yes, sir, I did. Mr. Fisher had brought Mrs. Lester out by my apartment when

we lived in an apartment. That is how I had met him. She used to go out beyond my apartment in Wheaton, Maryland, to buy apples all the time, and she would come by and we would separate the apples --

THE COURT: The question is what did she say about Mr. Fisher.

Suppose you read the question.

(The Reporter read the last question.)

THE WITNESS: Yes, sir, many times.

BY MR. MALLOY:

Q. Will you state what the conversations were? A. Well, one of them was she paid Leo for everything he did, because I asked her about him doing some things for her and she said she paid him. She would bring something from the beach for me and I offered to pay her and she said no, she paid Mr. Fisher to drive her down there in her car and bring the stuff back, and she had paid him many times for this.

She also mentioned about the will and mentioned Mr. [139] Fisher about that time when we were talking about her will.

Q. When was that, approximately? A. It's been about six years ago. And we came up, we was talking about a will. She talked to me about my family and about how we had settled my mother's estate.

Q. What did she say, if anything, about the will regarding the family? A. She told me that -- we had been down on the beach with Mr. Fisher, myself and my husband. We had done some work.

THE COURT: Just tell us what she said.

THE WITNESS: She said to me then that Mr. Fisher -- the family would have the beach home. I was working with them and she said the family would have the beach home and she was leaving Mr. Fisher a trailer and possibly a car. But the only thing she definitely said in the will he would get would be a trailer.

BY MR. MALLOY:

Q. That was about six years ago? A. Yes, sir.

Q. Did you have any conversation with Mr. Fisher regarding any matter? A. Well, at the time here lately Mr. Fisher would call me,

he would call me and say, Mrs. Bailey, this is Mr. [140 Fisher, I am calling for Mrs. Lester because she cannot see the phone and I am dialing and I will hand the phone to her. And then Aunt Em would then come on the telephone after Mr. Fisher had dialed me.

Q. In other words, Fisher dialed and said I am calling for Mrs. Lester because she cannot see to dial and I am putting her on the phone now? A. Yes, sir. Now previously to this Mrs. Lester called me herself and did her own dialing.

Q. Mrs. Bailey, based on the facts that you have just related, do you have an opinion as to whether Mrs. Emma Lester on July 1st, 1965 was of sound and disposing mind and capable of executing a valid deed or contract? A. No, sir, I don't think so, but I am not a medical man, but in my opinion as a common layman no, I don't think so.

Q. You don't think she was mentally competent? A. No, sir.

MR. MALLOY: You may cross examine.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. You mentioned that Mrs. Lester told you that she paid Mr. Fisher, is that correct? A. That is right, sir.

[141] Q. Did she pay him by the hour or the day or the week? Do you know how she paid him? A. You mean money or material or apples or oranges or what?

Q. Yes. A. Well, she just told me she paid him. I have seen her pay him in money and I have seen her pay him in material items.

Q. Did she pay him for the hour or the week? A. I wouldn't know how she would pay him because I wouldn't know what her extent of hours were.

Q. Did she take out withholding tax, as far as you know? A. Well, that is her personal business. I wouldn't know that.

Q. You were a confidant of hers, were you not? A. Yes, sir, I was. She told me about the beach home.

Q. She told you about her personal business? A. Yes. She told me about her beach home and about my writing to the judge to get the property settled that Mr. Simmons hadn't done, yes, sir.

Q. Did she tell you about the will of 1951 that she executed just prior to going into the hospital for a cancer [142] operation? A. I don't know which will that was, but Mrs. Lester had a lot of things that she kept in a blue box in a sewing machine. She pulled out a paper one day and said to me, This is my will, you won't have to worry, it is right here, I am leaving the property and my money to my family. And especially naming my father-in-law, Mr. Walter Bailey, and Mrs. -- Aunt Elsie.

Q. Did you ever know of a will where she left the beach property to Mr. Fisher prior to the present will here? A. No, I do not. The only will I know -- the only one she ever mentioned Mr. Fisher in is the one where she mentioned the trailer.

THE COURT: When was that statement made?

THE WITNESS: About six years ago, sir.

BY MR. POSTON:

Q. You don't know how much Mrs. Lester paid per hour for Mr. Fisher's services, do you? A. Now that is evident, sir, that I would not.

Q. And you don't know whether he was adequately paid, of your own personal knowledge, do you? A. Let me say this. I would say he was well paid for the many times she gave him things, yes.

[143] Q. That is your opinion. Do you know of your own personal knowledge exactly how much she paid for exactly how much -- for the amount of work he did? A. Dollars and pennies, no.

Q. Do you know how much she paid him for the work he did on the sea wall? A. In dollars and pennies?

Q. Yes. A. I don't think anybody but Mrs. Lester and Mr. Fisher would know.

Q. Isn't it a fact when she made the payment she would say, Here, Leo, here is something for you? A. No, it is not. When he would drive her to my house I would see her give him money, ten dollars, five dollars.

Q. Have you ever heard Mr. Fisher ask her for any money? A. Had I? Of course not. I have heard him borrow the car.

THE COURT: Just a moment. Wait until a question is asked.

BY MR. POSTON:

Q. Did you know Mr. Fisher? A. I met him through Mrs. Lester.

[144] Q. Many times? A. No, not many times.

Q. You have never seen him many times? A. I have seen him, but you said many times. I have only seen him when he would come to the house or when I went down to Mrs. Lester's which I wouldn't consider many times.

Q. When was the last time you saw Mrs. Lester? A. 1964. When I went down there we took her some Christmas presents and some items and we took the children down. A dog had been sick --

THE COURT: No, the question is when was the last time.

THE WITNESS: 1964.

THE COURT: Please confine yourself to answering questions.

THE WITNESS: 1964.

BY MR. POSTON:

Q. Was the last time you saw Mrs. Lester? A. Yes, alive.

MR. POSTON: No further questions -- may I ask one more question, Your Honor?

Q. Do you know Mrs. Lester's relations with Marie Bailey? [145]

A. No, not a great deal of it, no.

Q. Did you know that they didn't speak to each other for 12 years?

A. That is not true. I took Mrs. Marie Bailey --

THE COURT: Do you know or don't you know?

THE WITNESS: I don't know, no, but -- well, yes, I do know that is not true.

THE COURT: Just a moment. You will have to stop.

THE WITNESS: That is not true.

THE COURT: Witnesses must confine themselves to answering questions and not making speeches.

THE WITNESS: Well, then I can say that is not true.

THE COURT: You have answered the question.

Any further questions?

BY MR. POSTON:

Q. When she was discussing with you this particular will some six years ago and she said she was going to leave the property to the family, did she also include Marie in on this? A. She told me the family.

Q. She didn't specifically say Marie? A. No, she didn't specifically say anyone. She said the family.

[146] MR. POSTON: No further questions.

#### REDIRECT EXAMINATION

BY MR. MALLOY:

Q. With reference to this statement which you started to make, you said it wasn't true. What is true with reference to the answer? A. Not too many years ago we went down to Aunt Em's and she asked us to distribute Christmas gifts and I took a Christmas gift to Aunt Marie from Mrs. Lester.

Q. When was that? A. About eight years ago, sir. I have only been married 12 years and known the family.

Q. You said something with reference to writing something in connection with the case at the beach? A. Yes, sir.

Q. Will you state what was that and who told you to do any writing? A. Mrs. Lester called me one day and she said to me, Be, I am having trouble with the beach house. I knew there was a case there and I said, What's the matter, Aunt Em? And she said, Well, I would like for you, you are a friend of Mac Mathias, would you get in touch with him for me. And I said, Aunt Em, it's according to what it's for. She said she

had been having trouble getting the beach house settled. She [147] said she had been paying her lawyer, Mr. Simmons, for about a year and nothing had been done. She said, Would you write to a congressman and ask him to get it settled. So I said, Tell me what it is.

She told me the case had been heard, she had another lawyer down at the beach, but a decision had not been rendered for over a year and would I try to do something. And I said, Well, you want me to contact my lawyer? She said no. I said, Well, then, Aunt Em, I will write to the judge and tell him that I am in the family, you had asked me to write and ask him if he could possibly hand down a decision, and if he was too sick, if it could be handed down to another judge.

I wrote at my newspaper office the letter to the judge and I never got it back.

Now, I called her and she had not heard from the judge. She was very upset and very angry and said nothing had been done. I told her I would write another letter registered, where he would have to sign.

Q. She was very upset as a result of the matter? A. Yes, she was horribly upset.

MR. MALLOY: That is all.

[148] MR. POSTON: No questions.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Well, I think we will recess at this time until tomorrow morning.

Ladies and gentlemen of the jury, we are going to recess this trial at this time until tomorrow morning at 10 o'clock. You may be excused at this time. Please be back in the courtroom a few minutes before 10 o'clock tomorrow morning.

(At 3:45 trial stood in recess, to reconvene 10:00 a.m., March 18, 1966.)

[March 18, 1966]

[151]

THE COURT: Resume the case on trial. You may bring in the jury I am sorry that a prior matter has caused us to have a delayed start in this case this morning.

(The jury entered the court room.)

Call the next witness.

Whereupon BARBARA BUXTON was called as a witness and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name and keep your voice up so that the ladies and gentlemen of the jury can hear you. A. Barbara Buxton, B-u-x-t-o-n.

THE COURT: You will have to go slow so that we can follow you. What is your name?

THE WITNESS: Barbara Buxton.

THE COURT: Barbara Buxton?

THE WITNESS: Right. B-u-x-t-o-n.

THE COURT: Thank you.

BY MR. MALLOY:

Q. Where do you reside? [152] A. 438 New Jersey Avenue, Southeast, Washington.

Q. That is next door to 436 New Jersey Avenue, Southeast? A. That's right.

Q. How long have you resided at 438 New Jersey Avenue, Southeast? A. Since September 1964.

Q. Did you have occasion to observe your next door neighbor, Emma O. Lester? A. Yes.

Q. Did there come a time or will you state whether or not in your noticing of her whether her condition was tidy or untidy? A. Untidy.

Q. Did you have occasion to call on Mrs. Lester for any particular thing about January, 1965? A. Yes.

Q. Will you please state what was the incident and the nature of the matter? A. Well, it was the evening after a dinner party, I had a piece of—a large piece of steak left over and not wishing to throw it away, I had seen the dog that Mrs. Lester had, and thought it would be a good idea to give her the meat for the dog and I went next door and rang the bell and asked her if she would like to have the meat and she refused to take it.

[153] Q. Now, did you notice anything about her actions, her attitude, whether they were normal or clear or otherwise? A. She seemed to be a little frightened of me.

MR. MALLOY: All right. You may cross-examine.

MR. POSTON: No questions.

THE COURT: Step down.

(The witness left the stand.)

MR. MALLOY: Mrs. Bailey. Lillian Bailey.

Whereupon LILLIAN BAILEY was called as a witness and having been duly sworn, was examined and testified as follows;

**DIRECT EXAMINATION**

**BY MR. MALLOY:**

Q. Will you please state your name and try to keep your voice up so that the ladies and gentlemen of the jury will hear what you are saying. State your name. A. Mrs. Walter Bailey.

THE COURT: You will have to speak louder.

THE WITNESS: Mrs. Walter Bailey.

THE COURT: No. Tell us your own name.

THE WITNESS: Lillian is the first name, is that what you mean.

[154] THE COURT: Yes. The legal name is your own first name plus your married name.

THE WITNESS: All right. Mrs. Lillian Bailey.

THE COURT: What is it?

THE WITNESS: Lillian, L-i-l-l-i-a-n.

THE COURT: Lillian Bailey.

THE WITNESS: Yes.

BY MR. MALLOY:

Q. Where do you reside, Mrs. Bailey? A. 1201 Burton Street, Silver Spring, Maryland.

Q. What relationship do you bear to the deceased, Emma O. Lester? A. I am her sister-in-law.

Q. During her lifetime you had occasion to visit her at 436 New Jersey Avenue, Southeast? A. Yes, sir.

Q. And also at 1525 S Street, Southeast? A. Yes, sir.

Q. Directing your attention to the New Jersey Avenue visits, did you have occasion to visit her there? A. Yes, I did on several occasions.

Q. Directing your attention to about the years 1954 and thereafter, did you have occasion to actually go into the apartment where she was residing? [155] A. I did.

Q. Will you state what was the condition of the apartment? A. They were very, very bad. Her apartment was very unkept and she herself was the same way.

THE COURT: She herself was what?

THE WITNESS: The same way.

THE COURT: Yes. All of the jurors have to hear you so you have to speak very distinctly and slowly.

BY MR. MALLOY:

Q. As to her personal appearance, would you say it was tidy or untidy? A. Very untidy.

Q. Did you have occasion to talk with her and will you describe, if you know, anything that might have been said about whether her conver-

sation was rational or otherwise? A. Well, at times it was but she was very bad toward the last.

Q. What— A. She would rave—talk along and you wouldn't have understand what she said and she would talk about so many things that you didn't even know about.

Q. Would you say that her conversation was rambling or [156] otherwise? A. Yes, sir.

Q. Which? A. They were rambling and of course sometimes not understandable.

Q. Did you have occasion to visit the property at the beach at Deale Beach? A. Yes, sir. We went to the beach before the cottage was ever erected on it and had picnics there with the family.

Q. Did you have occasion to witness an incident when she threatened to shoot a neighbor there? A. Yes, sir.

Q. And your husband Walter calmed her down, was it? A. Yes, sir.

Q. Now, calling your attention to when she was at the S Street house, did you ever have any conversation with her as to whether she should call you by phone or otherwise? A. Well, yes, I did. I talked to her and asked her why she didn't call me once in a while and she told me, she says, "You know I can't even see and I don't hear good, and another thing, I can't dial the phone."

Q. Was that because she couldn't see to dial the phone? A. No, she couldn't—that's what she said.

Q. Did there come a time when you—do you know if your [157] husband Walter and Carol—Carol is your deceased brother of Walter—and Elsie owned a funeral lot for the family? Do you know anything about that? A. I do.

Q. Will you state, did you have occasion to go with Mrs. Lester to have the plot measured for a family headstone? A. I did.

Q. Calling your attention with reference to that, was there anybody else there with you and Mrs. Lester? A. Yes, Mr. Fisher.

Q. Mr. Fisher. And the lot was owned by Walter and Carol and Elsie Pinney. A. Yes, sir.

Q. And it was necessary to get their consent before the headstone could be erected? A. That's right.

Q. And you were there in place of your husband Walter to see that the cemetery people understood that? A. I was.

Q. Mrs. Bailey, based on the facts you have related and your experiences with the deceased, do you have an opinion as to whether or not Emma Lester, on July the 1st, 1965, was [158] of sound and disposing mind and capable of executing a valid deed and contract? A. No, I do not.

THE COURT: You do not have an opinion?

THE WITNESS: Well, I mean to say—

THE COURT: Suppose you read the question, please.

(Whereupon the last question was read by the reporter.)

THE WITNESS: She was unsound of mind and I don't believe she was able to do that.

MR. MALLOY: You may cross-examine.

THE COURT: She was able to do what?

THE WITNESS: Not able to do that.

THE COURT: Oh.

#### CROSS-EXAMINATION

BY MR. POSTON:

Q. Now, Mrs. Bailey, you realize that in some way if this will can be barred from probate that your husband will realize a substantial amount of money, is that correct? A. Well, he is not expecting it, I don't think.

Q. You don't— A. Well, I—he is not building his hopes on anything like that. He just wants something done that's right.

Q. Well, you know that he will get a lot more money if this will is set aside, don't you? [159] A. Well, probably he will.

Q. And you are pulling for your husband, are you not? A. I am.

Q. You tried to get Mrs. Lester to make a will at one time yourself, did you not? A. Several in the family have done that.

Q. Have you? A. Yes.

Q. And on many occasions, haven't you? A. Well, not too many occasions, but I knew and I thought it was about time she was doing something like that and even earlier than this time I talked to her and I thought that she should do something like that and I tried to reason with her a little bit.

Q. How many times have you tried to get her to make a will? A. Well, I don't believe it was more than once or twice that I ever talked to her about it. That's been sometime ago.

Q. When was the last time that you tried to get her to make a will? A. Well, it's been over a year or two that I haven't talked to her any more about it.

Q. Did you suggest what she put in this will? A. No, sir, I did not. I left it up to her to do what [160] she would.

Q. When was the last time that you saw Mrs. Lester alive, Mrs. Bailey? A. I saw Mrs. Lester about two weeks before she died.

Q. How many times did you see her between the first of the year of 1965 until she died, approximately? W. Well, I was over to her house on several occasions.

Q. Approximately how many times did you see her in the year 1965? A. About four or five times, four or five times.

Q. Did she ever come over to your house in 1965? A. No, she didn't come to my house in Silver Spring, but she visited me very often when I was on Randolph Street.

Q. How long had you lived in Silver Spring? A. Fifteen years.

Q. And she never visited your home the whole time you were in Silver Spring, is that right? A. No.

Q. Now, did you or your husband Walter see Mrs. Lester more frequently during the last year of her life? A. Yes, we did.

Q. Well, did you see her as often as your husband Walter? A. Maybe not because she used to go down to the shop and [161] see him a lot.

Q. But he saw her quite a bit more than you did, did he not? A. Well, no, I visited with her and her sister. We went often to the New Jersey Avenue house.

Q. You saw her in 1965 four times, is that correct, approximately? A. Well, it might have been more, but four or five.

Q. Would you say your husband Walter saw her more than four times in 1965? A. I think he did because she used to stop down to his shop and take things to him and then she used—we used to send things to her.

Q. Would it be fair to say that he had a better opportunity to observe her mental capacity in 1965 than you did? A. Yes, sir.

Q. Now, he has testified that on July the 21st, 1965, he thought she was pretty good mentally. Do you agree with that?

THE COURT: Oh, no, no. I do not think you may ask one witness whether the witness agrees with somebody else.

MR. POSTON: I withdraw the question on that.

BY MR. POSTON:

[162] Q. Now, on July 21, 1965, did she transact a business transaction involving the headstone for the family gravesite, isn't that correct? A. Yes, sir.

Q. Where was this done? A. At Cedar Hill Cemetery.

Q. And she handled the contract with that cemetery, isn't that correct? A. Yes, sir.

Q. She accomplished this—her purpose, did she not? A. Yes, sir.

Q. Prior to July 1, 1965, when was the last time you saw Mrs. Lester? A. I saw Mrs. Lester in June, sometime in June.

Q. Was that the first part of June? A. I really don't know, but it was between the first and the middle of June.

Q. Did you see her on July 1, 1965? A. No, did I not.

MR. POSTON: No further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. MALLOY:

Q. With reference to this erection of the headstone [163] in Cedar Hill Cemetery, did not the cemetery people request that the owners of the lot, that is, Walter and Carol and Elsie, give permission to have the headstone erected? Wasn't that why you were there? A. Yes, sir.

Q. So that it was, in a sense, Mrs. Lester was not the owner of the place, was she? A. No, sir.

Q. And you were there to give the consent of these—the family, so that the headstone could be erected? A. Yes, sir.

MR. MALLOY: That is all.

THE COURT: You may step down.

(The witness left the stand.)

Whereupon MARIE BAILEY was called as a witness and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name and try to keep your voice up so that the ladies and gentlemen of the jury can hear you. State your name. [164] A. Marie Bailey.

Q. Where do you reside? A. I live at 604 Aspen Street, Northwest.

Q. Washington, D. C.? A. In Tacoma Park, D. C.

Q. What relationship do you bear to the deceased, Emma Lester? A. My sister.

Q. And your brother Walter and Elsie are her only two other surviving heirs at law? A. Yes.

Q. How old are you, Mrs. Bailey? A. I am 76.

Q. How old is Walter? A. Walter is 74.

Q. And Elsie? A. She is 78.

Q. And Emma, the deceased, was how old? A. 81.

Q. She was the eldest of you? A. (Nods affirmatively.)

Q. Will you state how closely associated you were with your sister? A. Well, this goes back a long ways. You want me to go [165] back?

Q. When was she born? A. Well, she was born on April the 13th, 1884. And I was born on April the 17th.

Q. Well, then will you tell us briefly about her personal history, her schooling and what not, as you know it. A. Well, my sister Emma wouldn't go to school. She used to play out in the woods. We were living in a country town down at Quantico, Virginia, and she wouldn't go to school and her education was very poor. And she and I were closely associated for years and years and when we moved from Quantico, we all—the whole family became more or less separated in our living conditions. You want me to go on?

Q. Go ahead. Continue. A. And in 1908, the controversy had been about my sister's clothes she wore. Well, I am responsible for that dress, the same style dress she wore for over thirty years, and I made every stitch of clothes she wore in thirty years. Then when the family moved, my brother Carol and Elsie bought this home at Fifth and Emerson Streets, Northwest. I was in Raleigh, North Carolina. [166] I was with a business firm from New York and my sister wrote me and told me that they had moved one day and that she was alone in the house.

Q. Now, when you say your sister wrote to you, that was your sister—A. Sister Emma.

Q. Emma? A. Yes.

Q. She is the decedent here? A. Yes.

Q. All right. A. And she stated it seems like you are the only one I have left. She said they took Mamma and Papa and moved away. So she wrote me several letters telling me that—about the transaction and

her being alone and I told her whatever help she needed—I had a very good job then, was making good money—and I told her whatever she needed—she said it would be pretty hard on her to get started, that she was going to keep the home and turn it into apartments.

Q. And did you help her financially in turning into apartments? A. Yes, I did. Every week when I got my paycheck I sent her \$20. Then if she wrote me and told me she was a little tight, I would send her more.

[167] Q. Now, the house that you are referring to is 436 New Jersey Avenue, Southeast? A. Yes.

Q. All right. Now, then, can you mention any of the items that you remember that you did help her financially in changing the house from a family house so that she could have roomers? A. Yes. This firm I was with sent me south in the winter to Florida and in the summer months I was in the New England States, so, therefore, they gave me a week's vacation each time I went from one section to the other, and I came and stayed with Emma. Now, she wasn't able at that time to have—that was an awful big house and she wasn't able to have the electric and the heating plant put in. There were five latrobes in that house, when we used the old-fashioned latrobe, and I said, "Emma, I will help you. You have got to have that because you can't go to work and tend to all those latrobes."

And her husband was sick with cancer and he couldn't do very much. So I said, "Let's get Mr. Horn," that was a business man a few doors up from us, and he was in the plumbing business. And I said, "Let's get him in and see what he will give us an estimate on having baths put"—there was one bath [168] in the house at that time. So she got an estimate from him.

MR. POSTON: Your Honor, I—

BY MR. MALLOY:

Q. Just say what, if anything, you did with reference to whether you

helped financially in the cost of installation of these things and what they were installed—not what your conversation with Mr. Hanes was.

MR. POSTON: Your Honor, I don't see that that is material. It is an interesting story, but—

THE COURT: Well, I think any transactions between the witness and the deceased might have a bearing on the issue, but I think the testimony should be limited.

MR. MALLOY: That's right.

BY MR. MALLOY:

Q. Don't say what Mr. Hanes, just what you did. A. She got the contract for the big heating plant the furnace and the hot water heat and then the electric and she said it was \$160—

Q. Did you—what contribution—you then helped to defray the expense of the installation of the heating and plumbing plant there, is that right? A. I helped her to pay for it.

[169] Q. All right. Now did you—did there come a time that you left the New Jersey Avenue place? When you would come here would you stay there then at the house? A. Yes, I stayed there because I still had my bedroom there.

Q. All right. So that you came there and stayed there. Now, did there come a time when you left the New Jersey Avenue house and procured a house of your own? A. Yes.

Q. When was that approximately and where was the house? A. At 1103 South Carolina Avenue, Southeast, and that was in 1935.

Q. So that—now, then, at that time you then made a down payment on this house at 1135? A. No, my sister made it.

Q. Your— A. At 1103.

Q. I see. Where were you at that time? A. Well, I was—I was going in the tea room business out in Bethesda, and my sister said to me, she said, "Marie, [170] don't get in the tea room business. It's hard work and long hours," she said, "and I haven't said anything to

you but I have a house in mind that you could do the same as I am doing with this house here." And she said, "You helped me a lot and if it hadn't been for you I don't know what I would have done." And she said, "I will put a down payment on that for you and you get started in that house and have apartments."

Q. All right. Then as a result of that then you were to have this house at South Carolina Avenue? A. Yes.

Q. Now then did there come a time when settlement was to be made for that house? A. Yes.

Q. What then, if anything, occurred at that time with reference to that with your sister Emma? A. Well, I was out in Maryland, still helping to get the tea room fixed up and my sister came out there.

THE COURT: When you speak of your sister, you mean your sister Emma.

THE WITNESS: Emma.

BY MR. MALLOY:

Q. Now, don't mention the other sister, say Emma, so if [170] you say your sister Emma, and that—A. Well, she came out where I was and I was busy and she said, "Marie," she said, "I got a notice that we can get the house," and she said, "I am already for it. When can you come in?" And I said, "Well, Mrs. Gingell, G-i-n-g-e-l-l, "wants to get it"—that I was going in the tea room business with—"and she is in a hurry to get these drapes made." And I was making them.

And she said, "Well, suppose I go in and attend to all this and you can just stay here," that we have to be down there tomorrow. So I said, "Well, that's all right with me." And she went and settled this house up in her name. Then she went up to the gas and electric office and had the gas and electric turned on in her name. Then after that she called me and she said, "Marie, you are all ready to get your furniture out of storage." While I was traveling on the road, I had my furniture in storage. And she said, "Everything is ready for you whenever you are." And she said, "You just might as well have a place of your own." [172]

So I finished helping to get the tea room set up and then I came in a week later and started getting my furniture put in the house.

Q. Now this was intended then to be your house? Did you make any payments then? There was a mortgaged placed on the house, is that right? A. I made all the payments on it.

Q. For how long a period of time did you make the payments on the house. A. 18 years.

Q. During that time you made all the payments? A. All improvements.

Q. Did you make any improvements in the house? A. On the first floor there was a furnace in the kitchen and I didn't want that furnace in there so I said to Emma, I said, "You know, I would like to build a utility room on the outside of the kitchen and have the furnace moved out and some stationary tubs put in," because there were no stationary tubs in the kitchen or any place.

And she said, "You do whatever you please." She said, "You know, it's all yours and I don't want a D-part of it." She said, "Now you just do what you please." [173] So I started—I couldn't do it all at one time, just as I had the money to do it. I had improvements made on it and I built this furnace room which cost me around \$650. And my brother Walter, who is dead now, he was a steamfitter at Providence Hospital.

Q. You mean your brother Howard. A. Howard. And he said he would come over and help this man, Mr. Price, who was building the furnace room.

Q. Don't go into detail with that. But you did then make the improvements on the house and—A. Yes.

Q. It was understood and agreed between you and Emma that the house was yours? A. Yes.

Q. All right. Now then did there come a time when Emma took a different view of that situation? A. Yes.

Q. Now, then will you state just what she did when the house was—was that house then—was there a discussion between you and Emma as

to the sale of the house? A. Well, before that when the war came on was our [174] trouble, when she and I had our differences.

Q. When was that about? A. Well, I was offered a job in the Secret Service Department here, and I told Emma—she had just brought over three pieces of material for me to make her fall dresses and I said, "Well, I have a good job offered to me in the FBI," and I said, "I would like to take it." And I said, "If I take that I won't be able to come home and sew at nights and all, and make these clothes." And I said, "Maybe we can find you someone else that can do that." She said, "Marie, you know nobody can make my clothes but you."

She says, "I have tried it and you always have to rip them apart and make them over." So she said, "Try to make them some way." I said, "Well, I will try, but I don't see how I am going to do it." So I went down and took that job and I was only in that department three weeks when I was made a supervisor. Well, then I felt my duties were to be there and I couldn't take a day off. It was a hard war and everybody had to be on the job, so I never got around to making the dresses. [175] And then she came over one evening and she said, "If you don't make these dresses for me I don't give a D--- whether you have a Government job or how important you are, if you don't make these dresses for me"—

Q. Please get near the microphone, please. A. "I will get even with you." So I said, "Well, I don't think I can do it, but I will see." Well, it went on and on and I never got around to doing it. So one day she came over and she said, I am putting this house in the hands of a real estate man to collect rent from you." She said, and that was after she told me she would get even with me, so did that. I got a letter from Donoghue's on Pennsylvania Avenue.

Q. Now, then, did she then attempt to have the Rent Control Board change the payments that you had been making as a home owner—saying that you were renting the house from her?

MR. POSTON: Your Honor, I have to object to all of this.

THE COURT: I am going to sustain the objection. I [176] think that is a leading question.

MR. POSTON: All of this is very interesting, Your Honor, but I don't think it has anything to do with this will.

THE WITNESS: It has—

THE COURT: Just a moment. I think it is relevant in this way. There was testimony to the effect that unfortunately the deceased and the witness did not speak for years before the death of the deceased. I think, therefore, it is relevant, but try to make it brief.

MR. MALLOY: Not too detailed.

THE COURT: Mr. Malloy, try to make it brief.

BY MR. MALLOY:

Q. Not too much detail. Now the essential—A. Well, I want to tell you about Donoghue's, the real estate—

Q. You needn't mention that. The fact is that you had been the owner and had been making payments as the owner when she said she was going to get even with you and she then attempted to have you on a lease basis rather than as the owner? A. Yes.

[177] Q. All right. Now then with reference to that, then she tried and did there come a time then when you agreed to a sale of the house with her? A. Well, you are getting beyond the Rent Control Board.

THE COURT: Well, we do not want too many details.

THE WITNESS: Okay. Well then there came a time when I went down and I told her after we—

BY MR. MALLOY:

Q. When you say you told her, you mean Emma? A. Emma. That I was leaving, that I had bought a house and was leaving that house.

Q. So that you then bought another house? A. Yes.

Q. Is that the house where you are presently living? A. Yes.

Q. So that you then made arrangements to buy this house and you

told Emma that you were going to arrange then to have this house sold?

A. Yes.

Q. As she had requested. She said she wanted to have that done? Is that right? A. Well, she told me, she said, "Let's sell this house." [178] She Said, "You have a friend, a real estate man." I said, "Yes, I have." And she said, "Well, call him and ask him to come over and see what he will give us for it." Well, I called him when I went back home about 4:30 that afternoon and he said, "Yes"—

Q. Not what he said. Now just—A. Well, Mr. Gravette was the real estate man—and he said he would come over and look at the house. So I took him through and showed it to him and I asked him what he thought he could get for it, done in three apartments, and he said, "I think I can get you \$12,000."

Q. Now then was the house—then you had converted it into apartments and changed it and did all these improvements on it and had you paid these items yourself—A. Yes.

Q. —Not with any assistance from Emma? A. Oh, no, I paid them myself.

Q. Then did Mr. Gravette then sell the house? A. Yes, he sold it.

Q. Now then what happened to the proceeds of the house? A. Well, about six weeks after I left the house, moved [179] out and was up on Aspen Street, I got a big envelope one morning—up on the corner—from Emma O. Lester, and in it was a check for \$3,000 and not a word on the piece of paper the check was wrapped in or anything. That's all was on it. And that came from the Metropolis Building Association, a certified check.

Q. Now, did you then—what year was that?

A. That was in 1953.

Q. 1953? A. Yes.

THE COURT: '53 or '63?

MR. MALLOY: '53.

BY MR. MALLOY:

Q. Now then as a result of you getting the check for the \$3,000 did you then go to see your sister? A. About three weeks after that I had an occasion to go down right near her home on New Jersey Avenue, 436, and I thought: I will run in and see Emma for a few minutes. And I—she was always in the basement. That is where she lived. And I went to the basement door and rang the bell. And when she came to the door, I said, "Oh hello." [180] And she said, "You get the G-- D-- away from here," and banged the door in my face.

Q. Now, then, did you—is that the last time then that you had—A. I never went there any more because if I wasn't wanted I didn't want to go there.

Q. Now with reference to the sale of the house, you mentioned \$12,000. Was it actually sold for the \$12,000? A. Yes, it was sold for \$12,000.

Q. What happened to the \$9,000? A. She took it.

Q. Emma took it? A. Yes.

Q. And you—that was—you got \$3,000 out of it then. A. Yes.

Q. Now, did you have occasion to visit your sister on New Jersey Avenue prior to this time? I take it that this visit in 1953 was your last visit to 436 New Jersey Avenue? A. Yes.

Q. Prior to—

THE COURT: What was your answer?

THE WITNESS: Yes.

[181] BY MR. MALLOY:

Q. Prior to that time did you have occasion to enter and see the basement apartment where she lived? A. Yes, I did.

Q. Did you have occasion to observe the condition? A. It was rank.

Q. It was what?

THE COURT: What?

THE WITNESS: It was rank, it smelled so bad.

## BY MR. MALLOY:

Q. Now, did you have an occasion that any time shortly prior to your sister Emma had made a request to you with reference to any dogs or puppies? A. Yes.

Q. Will you state just in a short way what it was without—A. She had two dogs, one male and one female, and the female had nine puppies which she hadn't called me and told me she had them. But when the puppies were about eight or nine weeks old she called me one day and she was crying and she said, "Marie, for God's sake, come down here and help me." She said, "I have got these nine puppies here and I [182] do nothing but go with a bucket of water and a mop, cleaning up after them all the time."

And I said, "Well Emma, when were the puppies born?" And she said, "Well, they are eight or nine weeks old now and I am losing my mind over them." Now there was the two big dogs and the puppies.

And I said, "Well, why don't you put an ad in the paper for homes for them?" And she said, "Well, one lady offered me \$20 for one but I think I should get \$25, so I wouldn't take it." And I said, "In the pet column"—which I read every evening, I am a humane lady, I said, "there is always pet shops that will buy puppies and want them and I saw an ad just the other day where they were wanting puppies." And I said, "I will look it up and I will call you back." So I went through my back papers and I found this ad and it was over in Virginia and it was a pet shop said: interested in buying puppies.

So I called them up and I talked to them about it and they said to bring them over and let them look at them. So I called Emma and I said, "Emma, I think we can get rid of the puppies." [183] So she said, "Well, when can we go about it?" And I said, "If you have got anybody that can take us over with them and to have something to put them in," I said, "I can go any time tomorrow you want to go." So she said, "Well, I will see Mr. Schaeffer up the street." That was a neighbor. "And see if he will drive us over with the puppies."

So she called me up the first thing the next morning and said, "Mr. Schaeffer said he would take us over." So I went with her and I felt so sorry for her. She just was broken-hearted to part with all those puppies. But the pet man gave her \$20 for nine puppies.

Q. Did you have occasion at that time—when did she retire from the Government Printing Office? A. I think she retired July—about July the 1st, 1946, '46 or '47.

Q. Now in the three of these incidents did you have occasion to note any earlier incident in her childhood that she—did she have any trouble of any kind? A. Yes, she did.

Q. Will you in a short way describe what it was? A. Well, when she was about three years old she had scarlet fever and it left her with a running ear. And as the [184] years went on that got worse and worse and I went to the doctor with her on several occasions after she was quite older because that pus had eaten a pocket down in the side of her throat and it would lodge there and cause a hard lump to get in there and when that would get hard she was in terrific pain. And I myself many a time opened her throat up and took a swab and got that out and swabbed it with an iodine lotion and always after that until it filled up again she felt fairly good.

Q. And you say you had made these dresses for her for a period of about thirty years? She wouldn't use any other dress? A. No. Other—I made that one style dress and I made those dresses until—I tried my best to change them a little bit and make them a little bit more fashionable but she wouldn't have it.

Q. That was the incident when you got the position that caused your first break in your friendship then when you couldn't make the dresses because you were working? A. Yes. That was the break with us.

Q. Then did you notice any—in 1953, did you notice any change in her personal attitude of tidiness or untidiness [185] A. Yes, quite a bit. She got so she didn't care whether she was washed or dressed or not. That, so far as that was concerned, didn't mean a thing to her.

Q. Based on what you have observed from her and the facts, would you say that she was capable of executing a valid deed or contract?

MR. POSTON: Objection, Your Honor.

THE COURT: On what ground, Mr. Poston?

MR. POSTON: Beg your pardon.

THE COURT: On what ground, Mr. Poston.

MR. POSTON: She hadn't seen her in twelve years, Your Honor.

THE COURT: Objection sustained.

THE WITNESS: When she—do you—

THE COURT: Just a moment.

BY MR. MALLOY:

Q. Did you have occasion to know when she was in the hospital? A. In '52?

Q. In '52. A. For the cancer operation.

Q. Where was that? A. In Providence Hospital.

[186] Q. Did you have occasion to visit her there? A. I stayed with her, yes.

Q. You what? A. I stayed with her at nights while she was there. I didn't stay every night.

Q. You stayed in the hospital while she was there — A. Yes.

Q. —during the operation. A. Yes.

Q. Did you sleep there? A. I didn't sleep. I pulled two wooden chairs they had there in the room up and laid across them.

MR. MALLOY: You may cross-examine.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. Actually, you and Mrs. Lester fell out after you filed a suit against her, isn't that correct? A. I never filed any suit against Mrs. Lester and I never had any occasion to. She sued me.

Q. Weren't you and she involved in litigation that you initiated? A. No.

Q. Did she pay you \$3,000 or \$3,500? [187] A. \$3,000.

Q. And this was—A. No, I beg your pardon. It was \$3,500.

Q. It was \$3,500, wasn't it? A. Yes.

Q. And this was in payment of all the payments that you had made on the house, wasn't that correct? A. I paid nine thousand and eighty some dollars in it. I don't recall whether that's all I paid in it or not.

Q. How much did you pay a month? A. I paid \$42.50.

Q. Didn't you actually pay \$25 a month? A. I did not.

Q. Is this your payment book? A. I never had the book.

Q. You never—A. I have never seen that book.

Q. You have never seen the book? A. Never seen the book.

Q. Where did you make your payments? A. I gave it to her. I never got a receipt for it.

Q. Actually you were paying rent, were you not? A. No, I wasn't. I was paying on a house that was [188] supposed to be mine.

Q. You were paying \$42.50? A. \$42.50.

Q. And you had the run of the whole house, is that correct? A. I had the house.

Q. And Emma paid the—Mrs. Lester paid the utilities, did she? A. No, she didn't. I paid every—they were in her name but I paid them.

Q. Did you pay them to her? A. No, I paid them to the Gas and Electric Company.

Q. She paid the taxes on the place, did she? A. Yes, she paid the taxes.

Q. Did she always—A. She never would show me that bill of sale.

Q. And she always exercised dominion over the house, did she not? A. Exercised what?

Q. Control over the house? A. She tried to.

Q. Now in the last—A. Whatever law suit you are talking about—

[189] Q. There is no question pending now, Ma'am. In the last twelve years you had no association with her whatsoever, did you? A. I saw her drive past my house three or four times in that twelve years and

look in because I had just happened to be out front working on the front porch and in the yard when—the different times I saw her, but she never came in. When I left down there, I said, "Emma," I said, "now my door is open to you and you are welcome to come any time you want." And she said, "The h-- with you."

Q. In other words, you still liked her, is that correct, after your blowup? You had no hard feelings? A. I didn't have any real hard feelings against her, except that she didn't treat me right.

Q. Well, after she paid you the \$3,500 you felt better toward her, did you not? A. No, I didn't. I felt worse.

Q. Well, did you actually feel that she had treated you badly? A. I thought I was treated shameful by her in that respect because I should have had at least \$10,000 out of that house.

[190] Q. Well, did you ever send her a bill for the difference? Did you ever send a bill? A. I never thought of sending her a bill for it.

Q. Did you ask her for the money? A. I never asked her. I told her when I left there I was leaving and I left the house. I didn't tell her I wanted anything or I wanted her to do anything. I just told her I was leaving.

Q. But you did resent the fact that she didn't give you more money, is that correct? A. I was surprised when I got that check, but if she had sent me \$10,000 I would have thought that that was a kind deed.

Q. Well, now, did you at the time that she died have any expectation of her leaving you anything under all these circumstances? A. I never thought anything about it in the beginning.

Q. Well, I mean, did you think that—did you expect to get anything under her will? A. For a long time I thought that she would compensate me for what I had put in it.

Q. There came a time when you went down to Mr. Simmons' office to learn what was in the will? [191] A. I got a notice from him to come down there so I went.

Q. You thought at that time that she had left you something in the will, did you not? A. No. I never thought anything about it. I didn't know anything about it until he read it.

THE COURT: Well, we will take our luncheon recess at this time.

(Whereupon at 12:27 p.m. the Court recessed for luncheon until 1:45 p.m.)

[192]

AFTERNOON SESSION

THE COURT: You may proceed.

Whereupon MARIE BAILEY resumed the witness stand, having been previously duly sworn, and was further examined and testified as follows:

CROSS-EXAMINATION (Resumed)

MR. POSTON: I would like to have the reporter read back the last questions before lunch. To save time, I will ask another question.

THE COURT: Very well.

BY MR. POSTON:

Q. Now with reference to the house on Carolina Avenue, you rented the rooms out in that house, did you not? A. I didn't rent rooms. I made apartments in the house and rented apartments.

Q. You got a return from this building, is that right? A. Correct.

Q. How much did you get for the apartments? Each month? A. Well, I got \$58 for one and I got \$47.50 for the other.

THE COURT: I think all these financial transactions [193] really are not relevant.

BY MR. POSTON:

Q. As a matter of fact, when you left there, those premises, you left owing the gas and water bills, the utility bills, did you not?

THE COURT: I am going to exclude that. That has nothing to do with this case.

MR. POSTON: Well, Your Honor, I was just trying to show that this was another thing that made Mrs. Lester angry here and since we have gone into this matter in detail I thought we should—

THE COURT: Very well. I will let her answer it. You may answer.

THE WITNESS: I never left any bills that I know of. The bills never came until around the 10th of the month and I never paid the water bills. I paid my sister every month and she took care of the taxes and the water bills, but the gas and electric I paid and I paid every month that I lived in there.

BY MR. POSTON:

Q. When did you leave there? What time of the month did you leave the premises? A. I moved on the second—it took two days to move [194] and I moved on the second and third of November.

MR. MALLOY: I submit—

THE COURT: I am not going to go into all these minutia, because they have nothing to do with the case.

MR. POSTON: I agree, Your Honor.

BY MR. POSTON:

Q. Now, I repeat this question, Mrs. Bailey. Did you actually expect to get anything under the will of Mrs. Lester? A. I expected that house that was given to me and gotten from me, to compensate me for all the hundreds of dollars that I had helped Mrs. Lester with, when she was left alone in the big house on New Jersey Avenue.

Q. Do you recall having your deposition taken on December 3, 1965?

A. I think I remember that.

Q. And you were under oath then as you are here today? A. Yes.

Q. Referring to page 134, I would like to read this from the deposition:

Q. Were you really surprised she only left you \$1. A. If you want to know the real truth, I started not to come down here to your office when I got your letter because I said to a lady who lives with me, "I guest she just wants to wish me well." Then I decided since it was from a lawyer I should come down. I called Elsie and asked her did she get a letter and she said yes. She said, "Why, did you

get one?" I said yes. But I said I know she isn't leaving me anything and of course because she left me the dollar it was just to make it legal.

Q. Then you were not surprised? A. I wasn't surprised. Now was that true? A. I wouldn't be surprised—  
THE COURT: Just a moment. What was your question, Mr. Poston?

BY MR. POSTON:

Q. Were your answers at that time true?

THE COURT: No, no. You have to first ask her whether she made the answers.

BY MR. POSTON:

Q. Did you make those answers? A. Yes.

Q. Were those answers at the time true? A. They were just how I felt about it.

[196] MR. POSTON: All right. No further questions.

REDIRECT EXAMINATION

BY MR. MALLOY:

Q. The following question, when I asked you on page 135:

Q. Was there anything due you as a result of your business transactions with your sister? A. A lot.

Was that your answer to the question? A. Yes.

Q. Was—

THE COURT: What page are you reading from, Mr. Malloy?

MR. MALLOY: 135, Your Honor.

THE COURT: Yes.

BY MR. MALLOY:

Q. Now was that because of the fact that you had your business transactions and you had made these payments that you mentioned about and that the house had been sold for \$12,000? A. Yes.

MR. MALLOY: That's all.

MR. POSTON: Your Honor, I move that that be stricken [197] from the record. I think it is entirely immaterial.

THE COURT: Well, I know, but you went into it at some length.

MR. POSTON: I went into it because of the direct examination, Your Honor.

THE COURT: Motion denied. You know, you cannot save the waste of time that has occurred by striking things from the record. I think time should not have been taken up with so much detail of these transactions, but I think both sides are equally guilty.

You may step down.

(The witness left the stand.)

HAROLD HAYNES was called as a witness and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name and try to keep your voice up so that the ladies and gentlemen of the jury can hear you. A. Harold Haynes.

THE COURT: You will have to speak so everyone can hear you.

[198] THE WITNESS: Harold Haynes.

THE COURT: What is your last name?

THE WITNESS: Haynes, H-a-y-n-e-s.

THE COURT: Thank you.

BY MR. MALLOY:

Q. Where do you reside? A. 1521 Dale Drive, Silver Spring, Maryland.

Q. Well—

THE COURT: Mr. Haynes, some of the jurors who have to hear you are quite a distance away from where you are seated so you have to speak loudly. This is a big hall, so you have to speak slowly, loudly, and distinctly, like I am doing.

THE WITNESS: Fine. Thank you, sir.

THE COURT: You may proceed.

BY MR. MALLOY:

Q. Are you a member of the bar of the District of Columbia? A. Yes, sir.

Q. Are you a member of the bar of the State of Maryland? A. Yes, sir.

Q. What relationship do you bear to any of the parties in this case? [199] A. Mr. Walter Bailey is my brother-in-law.

Q. Calling your attention to early 1965, did you at the request of Mr. Bailey go to see his sister, Emma Lester? A. I did.

Q. How long had you known Mrs. Lester? A. I would say approximately 20 to 25 years.

Q. Had you had occasion in past years to consult with her with any business matters? A. Yes, sir.

Q. Calling your attention to this matter, was it with reference to the proposed sale of 436 New Jersey Avenue, Southeast? A. That is correct, sir.

Q. Will you state when—did you go to the premises? A. I went, I guess I went to the premises. I saw Mr. Bailey prior to that.

Q. And then did you go to 436 New Jersey Avenue, Southeast? A. That's correct sir.

Q. Now will you state to His Honor and the ladies and gentlemen of the jury just what you found? A. Well, the first time I went there, there was a dog in the yard and I looked at the dog and he looked at me and I [200] decided I shouldn't go in the yard, so I went next door, I think it was 438, and I knocked on the window, basement window—it was a three-story red brick house with a basement to it—and I got no response. I then got a heavy stick and I wrapped on the window—not the pane, but the wood part of the window—very hard and nobody came to the door.

I then came out of the yard and I walked along the front of the yard. The dog was still in there. There was an iron fence. And I waited about ten minutes. I didn't see anybody from any house anywhere around that I could ask any questions of, so I left.

Q. Then what, if anything, did you do? A. I contacted Mr. Bailey and told him I had been down there and he apparently made arrangements for me to go back there. He had gotten in contact with her apparently, to go back there and they fixed a date that I should go back.

Q. Did you then at a date fixed by Mr. Bailey with his sister Emma go back to the premises? A. That is correct, sir.

Q. Now, will you state what, if anything, you saw there [201] and what, if any, conversation took place? A. I went to the yard. The dog was not there. So I walked in and I knocked on the door and she was expecting me because she immediately came to the door. And she had a piece of paper in her hand and she walked along before me and I followed her into the basement—I guess it was a basement room there. It was all cluttered up, messed up, and had a hard time getting in there and getting through there. And she had this paper in her hands and she was waving this paper around, using profanity, stating that, here was the G-- D-- contract.

And she waved the contract around in her hand and said that everybody was trying to rob her, steal her money. And she said, "There is the G-- D-- contract." She says, "I am not going to sign the contract because it is not what I want." So I don't know just what the next was. Anyway, she said, "You just as well forget about this contract because I am not going to sign it." She said, "But I have some other papers that I want you to look at."

So she was in quite a bad mood and it was pretty [202] hard to get around there. She was all excited and went over—it looked to me like a bureau drawer—and she—looking for some papers. She says, "I have some papers I want you to look at. Don't bother about this contract, but I want you to look at these papers." And I didn't say anything until she kind of slowed down a little bit and she looked kind of bewildered. She didn't find the papers. She says that the G— D—papers weren't there.

So I didn't know what to say. I said, "Well, maybe your lawyer has

them." She says, "No, my lawyer doesn't have the papers." She said, "I have a young man that comes around here that helps me out occasionally." She says, "He knows where my papers are." And she says, "And I can't do a thing until I see him and ask him about these papers." She didn't say what they were, except she did tell me that she had a will. I didn't have anything to do with it.

She said she had a will and that she was—that she was leaving the property to her family. She said that while she had some disagreement with some members of the [203] family, she didn't mention any names except that she had had some disagreement at times on some deal—I don't know what it was, she didn't explain to me—and that—she said that—she used that old expression that blood was thicker than water and that she wanted the property to go to her family. I left one thing out there with reference to this young man that she had—said she had come around there.

I didn't know him, never met him in my life. And I said, "Well, it's nice that you can have somebody come around and help you out occasionally like that." She says, "Hell", she says, "I pay him and I pay him well for everything he does for me. I am under no obligation to him." She told me that he drove her where she wanted to go occasionally and she spoke of him cleaning out ashes out of the furnace in the basement—had a coal furnace apparently—and other tasks, but especially I remember the driving her car—he drove her car to the beach occasionally.

Q. Now with reference to this, did you observe anything about her personal appearance at the time? A. She was very poorly dressed and bedraggled, I would say, and the apartment was the same way. I suppose it was an apartment. It was on the ground floor there and she stood up [204] mostly—practically all the time I was there I stood up. She didn't ask me to sit down so I stood up also. In fact I didn't want to sit down there.

Q. Now did you say anything to her then with reference to the matter when she said about the papers that she couldn't find and she wanted you to look at, that she would have to ask this young man about—was there anything said to you? A. Yes, she told me—she calmed down quite a bit after that and she sat down and she sat there looking at me or looking at the floor—I don't know which—and I figured that she was completely exhausted—she was in entirely different condition than she was when I went in there—I told her, I said, now—I don't know whether I called her Emma or whether I called her by her married—Mrs.—married name—Stessen—no, Mrs. Lester.

I said, "Now, I would be very happy to come down any time you want me to, to look at any contracts or any papers you want me to look at, I will give you the best judgment I can." And she says, "Well, hell," she says, "I can't dial the telephone. How am I going to get in touch with you?" I said, "You call your brother, Mr. Bailey, and you [205] make whatever arrangements—your brother Walter—and make whatever arrangements you make and he will get in touch with me and I will be glad to come down."

At that point I figured that I was carrying the thing a little too far and I decided to get out and so I looked at her and her eyes were—looked to me like—not crying—but looked to me like she real—kind of milky like—but I just figured that she was completely exhausted. And I was a little worried to stay, to be frank with you. I didn't—all by ourselves—if somebody come in it would be different—there was nobody there—so I bade her goodbye and she said she would get in touch with me through Walter and that was the last time I ever saw Mrs. Lester.

Q. Now did you have anything to do with making any will for her?

A. No, sir.

Q. Did you actually ever see any will? A. I never saw it.

Q. Only what she had told you she was leaving it to the family? A. That's right.

Q. With reference to this, you said you had known her [206] for about a period of 20 or 25 years? Now based on the facts that you have related, and this talking to her was about when? A. I would say it was approximately—it was either a little before April 1. It could have been a little after April 1.

Q. Approximately around April the 1st? A. I would say so. I wouldn't go around there on April the 1st.

Q. 1965? A. 1965.

Q. Based on the facts you have related, do you have an opinion as to whether or not Emma O. Lester on July the 1st, 1965, was of sound and disposing mind and capable of executing a valid deed or contract? A. Well, it is my considered opinion, in view of Mrs. Lester's physical condition, her attire, and her eyes, and her hearing, and the general condition of that apartment when I was there—I—it is my opinion that she did not have I would say mental or physical ability to execute a valid or binding legal agreement.

THE COURT: Well, now, you were not asked about physical condition.

[207] BY MR. MALLOY:

Q. I asked you based on the facts whether or not in your opinion Mrs. Lester on July the 1st, 1965, was of sound and disposing mind and capable of executing a valid deed or contract? A. I would say she was not.

MR. MALLOY: You may cross-examine.

CROSS-EXAMINATION

BY MR. POSTON:

Q. Mr. Haynes, do you have a financial interest in this case? A. No, sir.

Q. Weren't you in the beginning the attorney in this case? A. I don't think so.

Q. Did you go to Mr. Simmons' office with Walter Bailey as his attorney? A. I did not go as his attorney, no, sir.

Q. Didn't you represent yourself to Mr. Simmons as Mr. Bailey's attorney? A. I may have said to him I was an attorney at law but I went not as attorney, I wouldn't say. I went as an advisor.

Q. As an advisor? [208] A. That's right, sir. You can consider if you want to say that, it is okay.

Q. Now, do you practice law in the District of Columbia? A. I have up until recently intermittently, yes, sir. I am retired.

Q. You retired? A. Semi-retired, yes, sir.

Q. You don't do anything now, is that right? A. No, no, I do plenty.

Q. What was the purpose of your going to see Mrs. Lester? A. Because Mr. Bailey called me up, said he had been talking to his sister and that she wanted to discuss some contract—a contract that she had and asked me if I would make arrangements to go see Mrs. Lester. That was my only interest.

Q. When you went there did you tell her you were there for that purpose? A. I did, sir.

Q. And then she talked about everything but that, is that right? A. She knew already what I was coming there for. She had the contract, whatever it was, in her hand.

Q. And she told you that she had made up her mind on [209] that, is that right? A. That's right, sir.

Q. Did you give her any advice on that contract? A. Never saw it. Don't know anything about it.

Q. How did you bring up the will or how did she bring up the will? A. She brought it up.

Q. How long were you there? A. Well, I would say at least an hour, maybe an hour and a half.

Q. Just standing, is that right? A. Every bit of the time I was there I stood.

Q. You didn't sit down? A. Didn't sit down.

Q. What kept you there so long if you weren't going to talk to her

about this contract? A. Well, she went into a lot of things. I couldn't tell her I wouldn't listen to her.

Q. Well— A. I could tell you a lot of—

Q. How many times— Mr. Haynes, how many times have you seen her in your whole lifetime? A. (Pause.)

Q. Have you seen her more than three times in your [210] lifetime?

A. Easily, yes, sir.

Q. Four times? A. Easily.

Q. Well, easily. How many times have you seen her in your whole lifetime? A. I have seen her at least five times and on two or three of the occasions it was on legal matters.

Q. Oh, you have been her attorney, is that right? A. I have been her attorney. I was her attorney on one or two occasions.

Q. You have been Walter Bailey's attorney on certain things, is that right? A. No, I wouldn't say that.

Q. Have you been paid for the advice that you gave Walter Bailey concerning this estate? A. No, sir. I haven't received one cent. They haven't promised me a penny. I don't expect to get a penny.

Q. You volunteered your services, is that right? A. Absolutely. I want to see justice done here.

Q. You would like to see this will broken, would you not? A. I certainly would.

[211] Q. Because your brother-in-law would stand to get a lot of money if this will is broken, isn't that right? A. No, he wouldn't get too much. They need it.

Q. He needs it? A. He needs it badly.

Q. I know.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. MALLOY:

Q. Mr. Poston mentioned the house. Did you have in your experience—do you know what the house sold for?

THE COURT: I don't think that makes any difference.

MR. MALLOY: All right. That's all.

THE COURT: You may step down.

(The witness left the stand.)

MR. MALLOY: May we approach the Bench, Your Honor?

THE COURT: Yes.

(Whereupon counsel approached the Bench and the following proceedings were held:)

MR. MALLOY: If Your Honor please, I have a Doctor Shapiro on call and he said he would be here about 2:30. I was thinking, and I would ask Your Honor if we could call Mr. Simmons as a hostile witness.

[212] THE COURT: You have a right to call anyone you please. However, let me suggest to you when you call a doctor, tell them to be here at the opening of court because when you tell them to be here at 2:30, they might not be here until 3:30, or if you tell them to be here at 11:00, they might not come until a quarter to twelve. It never fails.

MR. MALLOY: I thought that I would have—I wanted to try to see if we could clear up who made this.

THE COURT: It is up to you. You have a right to.

MR. MALLOY: With the understanding, I thought of saying that if he is still on the stand when the doctor comes in, I would withdraw him and put the doctor on.

THE COURT: You make that request in open court so the jury understands. I don't like Bench conferences except for matters that have to be kept confidential from the jury. For ordinary matters the jury should hear as well as the Court.

MR. MALLOY: Thank you, Your Honor.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

THE COURT: You may proceed.

MR. MALLOY: If Your Honor please, I would like to [213] call Mr. Simmons as a hostile witness.

THE COURT: Well, you may call him. I am not going to determine in advance whether he is hostile or not.

MR. MALLOY: He is the --

THE COURT: Well --

MR. MALLOY: Could it be with the understanding that if Doctor Shapiro comes here that he may be withdrawn?

THE COURT: You cannot make any understanding with the Court. You may make an appropriate request at the time.

Whereupon

J. BENJAMIN SIMMONS

was called as a witness by the Caveators, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name? A. J. Benjamin Simmons.

Q. And where do you reside? A. 709 Milestone Drive, Silver Spring, Maryland.

Q. I call your attention to the affidavit you made here on September the 16th, 1965, in which you filed the purported will in this case in the Probate Court.

Do you remember the affidavit? [214] A. May I see the document to which you are referring?

Q. I think it will be in the original file, I guess. I guess it will be in the jacket.

THE DEPUTY CLERK: Maybe I can assist you in finding what you want.

BY MR. MALLOY:

Q. Here it is. A. That is not an affidavit. It appears to be a copy of --

THE COURT: Just a moment. Do not forget that some of the jurors are quite a distance away.

THE WITNESS: Yes, Your Honor.

I may say, if it will save time, that appears to be a copy of an affidavit which I executed.

BY MR. MALLOY:

Q. In the Register of Wills office when you filed the will on --

A. That appears to be --

THE COURT: Do not waste time on this. Did you file a will?

THE WITNESS: Yes, I did.

THE COURT: Well, that is all there is.

BY MR. MALLOY:

Q. And at that time you stated that you had received the [215] will from Raymond Leon Fisher? A. That is correct.

Q. And that you did not know of any other instrument in writing and that was the only will? A. That is correct.

Q. When did you receive the will from Mr. Fisher? A. About two days after her death.

Q. About two days after her death? A. Possibly one day after death. It was very proximate to the time of death, but after the death, after death.

Q. Did you have anything to do with the preparation of the will?

A. No, I did not.

Q. Did you ever see the will until Mr. Fisher handed it to you?

A. Mr. Fisher handed me an envelope containing several documents, among which later turned out to be the will also.

Q. Had you ever seen the will prior to the time that Mr. Fisher handed it to you? A. No, I had not.

Q. Had you ever discussed the will or the contents with Mr. Fisher? [216] A. Not specifically. I had discussed the will with Mrs. Lester on June the 17th, of 1965, when she was in my office, but it was only a general discussion pertaining to a will and we did not get down to the specifics of a will and she did not ask me to draft a will.

Q. So that the will was handed to you by Mr. Fisher? Did you have anything -- is that right? A. I so testified.

Q. Did you prepare any other will for her? A. No, I did not.

Q. Now, with reference to the petition, and you might look at it -- I want to try to be accurate with the thing -- you did not make any mention in the petition, as I read it, of her Civil Service retirement.

Didn't you receive a letter from the Civil Service stating that she was entitled to a sum in her retirement? A. No, I have not received such a letter.

Q. You do not know that there is anything due from the Civil Service? A. I am not in a position --

THE COURT: I am wondering what that has to do with the issues of this case, Mr. Malloy.

The issues that we are trying are, first, whether the will was duly executed; second, whether the testatrix [217] was of sound and disposing mind; and third, whether there was any undue influence used.

MR. MALLOY: That's right.

THE COURT: I think you ought to concentrate pretty much on those issues.

MR. MALLOY: And I was coming to the next question about the --

THE COURT: Well, so far as this question is concerned, I think it is irrelevant.

BY MR. MALLOY:

Q. With reference to your petition she had two pieces of property in Deale Beach, Maryland, did she not? A. That is correct.

Q. One was right on the bay front and the other some distance back along the creek? A. That is also correct.

Q. You heard Mr. Bailey testify as to the value of \$26,000 on the bay front property. Would you say that that -- A. I am not an expert on valuations down there, but I would seriously question that valuation, based upon the tax assessment only.

THE WITNESS: Yes, Your Honor.

I may say, if it will save time, that appears to be a copy of an affidavit which I executed.

BY MR. MALLOY:

Q. In the Register of Wills office when you filed the will on --

A. That appears to be --

THE COURT: Do not waste time on this. Did you file a will?

THE WITNESS: Yes, I did.

THE COURT: Well, that is all there is.

BY MR. MALLOY:

Q. And at that time you stated that you had received the [215] will from Raymond Leon Fisher? A. That is correct.

Q. And that you did not know of any other instrument in writing and that was the only will? A. That is correct.

Q. When did you receive the will from Mr. Fisher? A. About two days after her death.

Q. About two days after her death? A. Possibly one day after death. It was very proximate to the time of death, but after the death, after death.

Q. Did you have anything to do with the preparation of the will?

A. No, I did not.

Q. Did you ever see the will until Mr. Fisher handed it to you?

A. Mr. Fisher handed me an envelope containing several documents, among which later turned out to be the will also.

Q. Had you ever seen the will prior to the time that Mr. Fisher handed it to you? A. No, I had not.

Q. Had you ever discussed the will or the contents with Mr. Fisher? [216] A. Not specifically. I had discussed the will with Mrs. Lester on June the 17th, of 1965, when she was in my office, but it was only a general discussion pertaining to a will and we did not get down to the specifics of a will and she did not ask me to draft a will.

Q. So that the will was handed to you by Mr. Fisher? Did you have anything -- is that right? A. I so testified.

Q. Did you prepare any other will for her? A. No, I did not.

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THE COURT: Now, Mr. Malloy, how is it relevant to get the value of the property?

[218] We are not trying any issue relating to it.

MR. MALLOY: All right. That's all.

MR. POSTON: No cross, Your Honor.

THE COURT: You may step down.

(Whereupon the witness left the stand.)

MR. MALLOY: I would like to check and see if Doctor Shapiro is in the hallway.

THE COURT: Very well.

[219] Whereupon

HYMAN DAVID SHAPIRO

was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALLOY:

Q. Will you please state your name and try to keep your voice up so that the ladies and gentlemen of the jury will hear you? A. Hyman David Shapiro.

Q. What is your profession? A. I am a physician.

Q. Are you licensed to practice medicine and surgery in the District of Columbia? A. I have, since 1919.

Q. What medical school --

THE COURT: Do not go into that. Are you trying to qualify him as a specialist?

MR. MALLOY: As a specialist.

THE COURT: In what?

MR. MALLOY: Psychiatry and --

[220] THE COURT: Will the doctor's qualifications in psychiatry be admitted?

MR. POSTON: Yes, I will stipulate that.

THE COURT: Very well.

That will save the doctor the embarrassment of having to relate his autobiography.

BY MR. MALLOY:

Q. You are a specialist in psychiatry. Any other branch -- neurology? A. Yes. Also I am certified as a specialist in both neurology and psychiatry.

MR. MALLOY: I assume that it will not be necessary to go into any further details?

THE COURT: No, no. The doctor's qualifications are conceded.

BY MR. MALLOY:

Q. Have you ever served in the Armed Forces, Doctor?

THE COURT: No, no, no. Just get down to the issues of this case.

BY MR. MALLOY:

Q. Were you personally acquainted with Emma O. Lester? A. I was not.

Q. Have you at any time treated or examined her? A. I have not.

[221] Q. Doctor, I am going to ask you a hypothetical question concerning facts similar to those in evidence in this case.

In other words, I will ask you to assume certain facts as true and to give an opinion based on these assumed facts.

Do you recall my discussion with you, as I do with other witnesses, your testimony in this case? A. Well, you discussed certain aspects of the case with me.

Q. Doctor, I ask you to assume the following facts:

Assume that a person was born April 13, 1884; suffered from scarlet fever as a child of three, which left her with an ear discharge that affected her hearing;

That she was employed in Government service, retiring about July the 1st, 1947; that as she had purchased with her sister jointly premises about 1918 and later about 1925, 1929, as a result of her striking

her father with an umbrella, the family dissolved so that a brother and sister took the parents and lived in another home, but they retained their friendship with this person;

That after the departure of the brother and sister and the parents the house was converted to use of roomers in which another sister helped financially in modifying or changing the place so as to make it fit for occupancy;

[222] That later about 1953 this person had differences with the sister who had helped her financially in which she cussed her out and slammed the door in her face and said she did not want to see her again, and as a result of this, the sister did not see her;

That about the year 1952 this person had a cancer operation and later suffered from heart trouble and generalized arteriosclerosis; had obsession that neighbors were trying to poison her dog; failed to recognize her nephew standing before her in the year about 1964 until he repeated who he was;

Related the same conversation in connection with other members of her family and others; repeated over and over again; rambled about trivial things; could not remain on one subject;

Lived in a very dirty basement apartment so cluttered that it was difficult to walk through and not possible to keep clean and sanitary;

Permitted a large dog to roam over the apartment and sleep on her bed; bugs were prevalent; her clothes soiled and unkempt in her personal appearance;

Unusual bragging and gloating; stated that the family was not going to want for anything when she died; called her sister a G-D-S-B when she became startled [223] at a roach when she was at the toaster preparing food for this person who was ill; unable to recognize her sister two feet away about June 15, 1965, when she visited her.

Assume further that this person executed a paper writing purporting to be her last will and testament on July the 1st, 1965, when she was 81 years of age.

Assuming all these facts to be true, do you have an opinion as to the mental condition of this person on July 1, 1965?

MR. POSTON: Objection, Your Honor.

I object to that hypothetical question.

THE COURT: On what ground?

MR. POSTON: I object on the ground that I do not think this is a proper foundation, that all that has been done here is to reiterate innuendoes.

There were a lot of things there that there has been no clear-cut evidence on.

THE COURT: I followed the question very carefully. I think there is some evidence to sustain every part of the hypothesis.

Of course there is evidence the other way, but every counsel has a right to frame his hypothetical questions on the basis of the evidence as he sees it.

You have a right to bring out on cross examination [224] some of these other matters.

MR. POSTON: Well, Your Honor, on the matter of failing to recognize people, the evidence indicated nothing more than possibly bad eyesight and --

THE COURT: I think there your point is well taken. I think the failure to recognize is due to failing eyesight and there is no suggestion that failure to recognize was due to any mental failure.

MR. MALLOY: That would be a matter of interpretation, if Your Honor please.

THE COURT: I will sustain Mr. Poston's objection just on that one aspect of the matter.

I think you should correct your hypothetical question to indicate that failure of recognition was due to failing eyesight. I think that will suffice.

Otherwise I will allow the question. You may bring out other matters on cross examination, Mr. Poston.

BY MR. MALLOY:

Q. Change that to modify that so that failure to recognize the sister two feet away was due to eyesight. A. Yes, sir, I have an opinion.

Q. What is that opinion? A. The opinion would indicate that this person was suffering from some type of mental disorder and the fact that [225] she had been having arteriosclerosis for years prior to then, together with the incidents you mentioned, many of them, leaving out the eyesight, prior to -- was that July of 1954?

Q. Yes. A. When she executed --

THE COURT: Did you say arteriosclerosis? Is that the word you used?

THE WITNESS: Yes. The hypothetical question indicated that she had been suffering from arteriosclerosis.

In my opinion such a person was suffering from generalized and cerebral, that is, arteriosclerosis of the brain as well as her body.

BY MR. MALLOY:

Q. Do you have an opinion as to whether such a person was of sound and disposing mind and capable of executing a valid deed or contract on July the 1st, 1965? A. On the basis of the assumed facts as mentioned I do not.

Q. Then it is your opinion that she was not on July the 1st, of sufficient mind and memory to execute a valid deed or contract? A. That is correct.

MR. MALLOY: You may cross examine.

[226]

CROSS EXAMINATION

BY MR. POSTON:

Q. Doctor Shapiro, you have never seen this woman in your life, is that correct? A. I have never seen her.

Q. This is quite a long-range type of prognostication or opinion, isn't that correct? A. I don't know what you mean by a long-range --

Q. Well, I mean since you have never treated her, you would have

no actual knowledge as to what her condition was, would you? A. Well as a specialist in neurology and psychiatry on the assumed facts in the hypothetical question there is no question in my mind that she had this.

Q. Now, have you ever discussed this case with her attending physician, Doctor Summerfield? A. No, I did not, but I did see the death certificate.

Q. You never discussed it with her attending physician? A. No, I have not.

Q. Did you ever attempt to discuss it with him? A. I have not.

Q. How long have you been aware that you were going to testify here today? A. Oh, over the past month or so.

[227] Q. Wouldn't it have been of some benefit to you to have discussed this matter with her attending physician? A. Possibly, but I felt the facts spoke for themselves.

Q. In other words, you were anxious to come here and state your opinion on these facts?

THE COURT: Just a moment. I do not think you have a right to use the word "anxious" the way you did.

MR. POSTON: I am sorry.

BY MR. POSTON:

Q. You are being paid for your testimony, are you not? A. Yes, naturally.

Q. Now, arteriosclerosis is nothing more than the hardening of the arteries, isn't that correct? A. Yes, nothing much more than that.

Q. Don't you have arteriosclerosis? A. No, sir, I do not.

Q. You do not have any hardening of the arteries? A. I do not have. I have been examined.

Q. Doesn't hardening of the arteries begin fairly early in a person's life? A. In some people it does.

In other words, change in the arteries may occur at any time in life but as one gets older there is a tendency [228] for it to develop, but the question as to the degree that it develops is important.

Periodic examinations may disclose its presence or absence but many people who are in advanced years may or may not have arteriosclerosis.

Q. Isn't -- A. You asked me. I have had a physical examination within the past few months.

THE COURT: I do not think you ought to ask the doctor concerning himself.

MR. POSTON: I am sorry, Your Honor.

THE COURT: I do not think that is proper.

BY MR. POSTON:

Q. It is merely the changing of the walls of the arteries, isn't that correct? A. Changing of the walls and narrowing of the lumen, narrowing of the caliber of it so that there is less and less blood to the part, whether it is the heart, the legs, or to the brain.

Q. Normally when a man gets into his sixties he does have some -- or a woman, as a matter of fact -- when a man or woman gets into the sixties, normally they have some arteriosclerosis? [229] A. No, I disagree with that.

THE COURT: Just a moment. Please do not testify. You may ask questions.

THE WITNESS: I may state that people have been elected as president of the United States in their sixties and assuming your hypothesis to be true, these people are disabled.

BY MR. POSTON:

Q. No. A. Well, you stated that they have arteriosclerosis.

Q. Do they have any hardening of the arteries -- A. They may or may not, as I have said. They can be perfectly lucid, competent, able to exercise --

Q. That isn't my question, Doctor.

Ordinarily when a person gets into the sixties, hasn't there been some change in the wall and structure of his arteries?

Haven't the artery walls become a little less flexible by the time a

man or woman ordinarily reaches -- A. Not necessarily. Personally, I run a blood pressure of 108, which is contrary to the hardening of the arteries.

Q. When you have arteriosclerosis, does your blood pressure go up? [230] A. It usually does because the more deposit you have inside the blood vessel and the narrower the stream, the more there is a tendency for the blood pressure to go up to force the arteries through some obstruction.

Q. Now, ordinarily, a woman 81 years old with arteriosclerosis, what would her blood pressure be? A. It could vary.

Q. What range? A. It could be from normal. If the arteries are so hard that you cannot -- it doesn't have the resiliency to show off in the cuff, or it may be elevated considerably.

Q. Now, what would the range ordinarily be, Doctor Shapiro? A. The range could be anywhere from 100 to 250. Systolic. There are two ranges: One is the pressure of the systolic at the apex of the heart beat. That is at the full force of the heart. And the diastolic, the heart at rest.

MR. POSTON: Excuse me just a moment, Your Honor.

THE COURT: Take all the time you need.

BY MR. POSTON:

Q. Now, Doctor Shapiro, are you familiar with the form of making death certificates here in the District of Columbia? [231] A. I certainly am.

Q. When a diagnosis has been made, cerebral vascular accident, arteriosclerosis generalized, that doesn't mean arteriosclerosis of the brain, does it? A. Yes, sir.

Will you repeat that again, what the death certificate says, so I can amplify on it, if you want me to.

Q. Arteriosclerosis generalized. A. With what else? You added something else.

Q. Cerebral vascular accident. A. The cerebral vascular acci-

dent means that it was generalized including the body and of the brain. Cerebral vascular means the blood vessels of the brain.

THE COURT: Now, Doctor, am I right that cerebral vascular accident is a scientific name for what we laymen call a stroke?

THE WITNESS: For a stroke or for a gradual occlusion. It doesn't necessarily have to be an apoplexy, a sudden stroke, but it can be several small strokes.

THE COURT: But a stroke?

THE WITNESS: Yes.

BY MR. POSTON:

Q. Now, Doctor Shapiro, there are many people with [232] hardening of the arteries who are still mentally competent, isn't that correct?

A. That is correct.

MR. POSTON: Excuse me just a moment, Your Honor.

THE COURT: Surely.

MR. POSTON: Nothing further, Your Honor.

THE COURT: Anything further?

#### REDIRECT EXAMINATION

BY MR. MALLOY:

Q. But it is your opinion in this case that this party, from the facts, was not mentally competent on July the 1st? A. On the basis of her personality changes as mentioned in the hypothetical question, plus the confirmation of the cerebral -- I mean some cerebral vessel involvement on her death certificate.

Q. Thank you.

THE COURT: Doctor, you may be excused.

(Whereupon the witness left the stand.)

[233] MR. MALLOY: I would like to call, if Your Honor please, as a hostile witness, Mr. Raymond Leon Fisher.

THE COURT: Very well.

Whereupon

## RAYMOND LEON FISHER

was called as a witness by the Caveators, and having been duly sworn, was examined and testified as follows:

BY MR. MALLOY:

Q. Please state your name. A. Raymond Leon Fisher.

Q. And where do you reside? A. At 1319 North Adams Street in Arlington.

Q. Virginia? A. Virginia.

Q. You met Mrs. Lester about October the 13th, 1939? A. Yes, I did.

Q. And you then roomed at her house at 436 New Jersey Avenue, Southeast? A. I did.

Q. For about a month? A. I did.

Q. Then you went to 436 First Street, Southeast? A. Yes.

[234] Q. Who was the name of the owner of the First Street house?

A. Her name was Bennix.

Q. Bennix? A. Yes.

Q. Now directing your attention to this paper writing dated July the 1st, 1965, you had purchased the form -- this form on which the paper is prepared, is that right? A. Yes, I had.

Q. Where did you procure the form? A. At Woodhouse Printing up on Eye Street. I think it is Eye Street.

Q. Was that a long time or a short time before July the 1st, 1965?

A. It was about the first week of May.

Q. About the first week of May -- A. Yes.

Q. When you purchased it.

And then you brought it to Mrs. Lester? A. Yes, she asked me --

Q. When did you --

THE COURT: I think you better not ask leading questions.

[235] MR. MALLOY: Well, I think he is a hostile witness, if Your Honor please.

THE COURT: Do not ask leading questions.

BY MR. MALLOY:

Q. Where you gave it to Mrs. Lester when? A. The day that I purchased it. There were two of them, two forms that I got for her. She asked me to get them for her that day.

THE COURT: Speak up so all the jurors can hear you.

BY MR. MALLOY:

Q. When was that? You said sometime in May? A. In the first week of May, 1965.

Q. And you then brought it to her at 436 New Jersey Avenue, Southeast? A. No --

Q. No, she was then at -- A. She was --

Q. 1525 -- A. 1525 S Street --

Q. S Street, Southeast? A. Yes.

Q. And that is where you brought it to her? A. Yes.

Q. How long had she been at the S Street house at that [236] time? A. She moved there the last day of April. She made settlement on the property.

Q. April the -- A. 1965.

Q. 1965. A. Yes.

Q. So she had been there then about approximately two months, two and a half, three months? A. Just a few days.

Q. No, I mean when -- she was there from April the 30th, May and June and July the 1st, was this, when this paper was signed, so it was two months about? A. Yes.

Q. Now, you had procured the form at the Woodhouse Stationery Store? A. Yes.

Q. And when the paper was being executed, you called your daughter --

THE COURT: Now, please don't do that.

BY MR. MALLOY:

Q. Did you call your daughter?

THE COURT: No, no. I am not going to permit that. [237] This is very vital. I think you ought to ask questions that don't suggest answers, but don't ask leading questions.

BY MR. MALLOY:

Q. Did you make any call with reference to procuring witnesses for this will? A. Yes.

Q. To whom did you make the call? A. To my daughter, Nancy Ferraiuolo.

Q. Did you make a call to your son-in-law, George? A. No.

Q. Do you know whether your daughter made a call to him? A. She did, because she called me back and told me that he would come.

Q. And as a result of that call -- where were you then? Where were you calling from? A. From 1525 S Street, Southeast.

Q. 1525 S Street, Southeast? A. Yes.

Q. And as a result then of that call you then waited --

THE COURT: Now --

BY MR. MALLOY:

Q. Did you wait --

[238] THE COURT: Ask him what happened instead of leading.

BY MR. MALLOY:

Q. All right. What happened then?

THE COURT: I am going to strike this testimony out if it is brought out this way, Mr. Malloy, because this is very vital.

What happened then after you made the telephone call?

THE WITNESS: They said they could come over between one and two. At that time it was about 11:30, and I waited until they came.

BY MR. MALLOY:

Q. Now when they came there what, if anything, did you do? A. Nothing but entertain the dog.

Q. Well, did you open the door for them? A. Yes, I met them at the door.

THE COURT: Do not ask leading questions.

BY MR. MALLOY:

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BY MR. MALLOY:

Q. Now when they came there what, if anything, did you do? A. Nothing but entertain the dog.

Q. Well, did you open the door for them? A. Yes, I met them at the door.

Q. And then did you take them into the room or what did you do?  
A. I collared the dog and they went back on -- back where Mrs. Lester was, herself.

Q. Now, where were you at that time, about how far away from Mrs. Lester were you when they were with Mrs. Lester? [239] A. It was about the length of the two rooms. It would be about 20 feet.

Q. About 20 feet away? A. Yes.

Q. And then your daughter and George signed the paper? A. Yes. She signed it and then they signed it.

THE COURT: Who is she?

THE WITNESS: Mrs. Lester.

MR. MALLOY: Now --

THE COURT: Just a moment. I am going to strike out the last question and answer because they were leading questions.

Suppose you proceed without leading questions, Mr. Malloy.

MR. MALLOY: Well, I asked him where --

THE COURT: This is one of the most vital points in the whole case.

MR. MALLOY: But I asked him where he was and he said he was about 20 feet away.

THE COURT: I know, but you may ask what he saw happened, instead of asking did so and so sign.

BY MR. MALLOY:

Q. What happened at that time? [240] A. They talked a little while and then they signed the papers.

THE COURT: How --

BY MR. MALLOY:

Q. When you say they --

THE COURT: Just a moment. How did they happen to sign?

THE WITNESS: She asked them to.

THE COURT: Who is she?

THE WITNESS: Mrs. Lester.

THE COURT: Now what did she say?

THE WITNESS: I don't know.

BY MR. MALLOY:

Q. Following the signing, what, if anything, occurred? A. Well, she asked them to stop and have a cup of tea with her and they did that and visited a little while and then they left. I stayed.

Q. Then when you stayed, what, if anything, did Mrs. Lester do with reference to the paper writing which had been signed? A. Well, we discussed it some. She signed it an envelope and gave it to me.

Q. Then what did you do with it? A. It was in my possession until the time I --

[241] Q. What did you do? You -- A. I put it in my pocket.

Q. You put it in your pocket?

That was on July the 1st, 1965? A. Yes.

Q. Then what did you do with it? A. I took it home and put it in a box that I have -- that I have had papers for Mrs. Lester in for years.

Q. Is that at your home in Arlington? A. It is.

Q. Virginia? A. It is.

Q. And you kept it there then from July the 1st, until when? A. Until the morning following her death.

Q. And when did she die? A. She died on the first day of September, 1965.

Q. And then what did you do with the paper? A. I took it to the office of Mr. J. Benjamin Simmons and turned it over to him.

Q. And then he filed it here? A. Yes.

Q. Now, you had known or had you known Mr. Walter Bailey [242] and Miss Pinney and Mrs. Marie Bailey prior to July the 1st, and September the 1st? A. I had known all of them for 25 years and considered them some of my best friends.

THE COURT: Well, I think we will suspend at this time for our usual mid-afternoon recess and give a short respite.

(Whereupon the Court took a short recess.)

THE COURT: Mr. Malloy, you may proceed.

BY MR. MALLOY:

Q. I think the last question, Mr. Fisher, was that you put the purported will in your pocket and took it to your home in Virginia. That was on July the 1st, 1965? A. Yes.

Q. And then did you keep it at your home in Virginia until after the death of Mrs. Lester on September the 1st, 1965? A. Yes.

Q. And then you turned it --

THE COURT: Speak up so everyone can hear you.

BY MR. MALLOY:

Q. Then you turned it over to Mr. Simmons? A. I did, yes.

Q. Do you know -- or, first, did you prepare the paper [243] writing? A. No, I did not.

Q. Do you know who did prepare it?

THE COURT: By preparing, you mean typed it?

BY MR. MALLOY:

Q. Who typed it? A. No, I do not know.

Q. Do you type? A. No.

Q. Does Mrs. Lester type? A. No.

MR. MALLOY: That is all, Your Honor.

THE COURT: Do you want to cross examine?

MR. POSTON: Yes, Your Honor.

THE COURT: Very well.

#### CROSS EXAMINATION

BY MR. POSTON:

Q. Mr. Fisher, had you ever obtained will forms for Mrs. Lester prior to the time you mentioned here? A. Yes, I had.

Q. When was this? A. That was in 1951 or '52.

Q. Was this at her request? [244] A. Yes.

Q. Now, on the day --

THE COURT: You say in 1951 you prepared another will?

THE WITNESS: No.

THE COURT: What did you do?

THE WITNESS: I bought two forms for her.

THE COURT: You bought forms?

THE WITNESS: Yes.

BY MR. POSTON:

Q. Well, now, on the date of July 1, 1965, when did you arrive at Mrs. Lester's place? A. It was about 11:30 in the forenoon.

Q. And what did she tell you at that time? A. She told me that she had had a will prepared and she wanted to know if I could find someone that could witness it for her.

And we talked it over, but she didn't want anyone in the neighborhood because she didn't want anyone to know that she had anything and she didn't want anyone in the family.

And we spoke about two neighbor ladies that she knew but I called them and there was no one home.

Q. Who were they? [245] A. That was Emma Tull and Geraldine Bracken.

Q. Go on. A. And then I suggested that maybe George and Nancy would come over and do it.

Q. Was this agreeable to her? A. It was agreeable to her. She has known Nancy since she was a baby and all and they were not beneficiaries.

Q. Well, did she want to execute the will right then and there? A. Yes, she wanted to take care of it right that day.

Q. So what did you do? A. I called Nancy at home and asked her if it would be possible for her to call George and see if he could bring her over on important business. I didn't tell them what it was. I just said it was important.

Q. And they did come over? A. They came over.

Q. Now, after the will was executed, I believe you testified that Mrs. Lester gave it to you, is that correct? A. Yes.

Q. And for what reason did she give it to you? A. Well, I didn't like holding it too much myself, but she said if anything happened to her and the family found [246] it they would tear it up.

Q. Well, did you have a place to keep it? A. I had kept papers for her for years.

Q. Where did you keep them in your home? A. It was in the bedroom closet in a metal ammunition box that I have.

Q. Well, at that time did she give you any particular instructions in the event of her death? A. Yes. I was to turn the will and any other important papers over to Mr. J. Benjamin Simmons, whom she named administrator in the will.

Q. At that time you had known her for over 25 years, is that right? A. Yes, about 27 years.

Q. What did you observe in connection with her mental condition on that day?

MR. MALLOY: I object, if Your Honor please?

THE COURT: On what grounds?

MR. MALLOY: It is not responsive to the direct examination.

THE COURT: I think it is within the scope of the direct examination. That is concerning the events of that day. I will allow it.

[247] MR. MALLOY: Well, if Your Honor please --

THE COURT: I am allowing it.

THE WITNESS: I lost the question.

THE COURT: Will you read the question, please, Mrs. Wells? (Whereupon the last question was read by the reporter.)

THE WITNESS: There was nothing wrong with her mental condition that day. She was up to her usual form.

BY MR. POSTON:

Q. Well, was she rambling in her conversation? A. No.

Q. Was she coherent? A. Yes.

Q. Did she understand everything that was said? A. Yes.

Q. In your opinion, on that day, was she of sound or unsound mind?  
A. She was of sound mind that day.

MR. POSTON: No further questions, Your Honor.

THE COURT: What is your occupation, Mr. Fisher?

THE WITNESS: I work for the United States Government Printing Office. I work in the production manager's office there.

[248] THE COURT: In what capacity?

THE WITNESS: It is clerical work in work scheduling, and things like that.

I have been there for 25 years.

THE COURT: I see.

Any redirect examination?

#### REDIRECT EXAMINATION

BY MR. MALLOY:

Q. You are not a lawyer, are you? A. No.

MR. MALLOY: That is all.

THE COURT: You may stand down.

(Whereupon the witness left the stand.)

MR. MALLOY: That is our case, if Your Honor please.

THE COURT: The caveators rest?

MR. MALLOY: Yes, Your Honor.

MR. POSTON: Your Honor, at this time I would like to make a motion.

THE COURT: Yes, indeed. Come to the Bench.

(Whereupon counsel approached the Bench and the following proceedings were held:)

MR. POSTON: Your Honor, at this time I would like to move for a directed verdict on all of the issues in this case, including the issue of undue influence, and including [249] the issue of fraud and deceit.

THE COURT: Well, I think there is no evidence of fraud and deceit.

MR. MALLOY: If Your Honor please, there is by reason of the

fact that Mrs. Pinney testified that Fisher told her that when he wanted her to get to do something he would stay away for several days and that since she was depending on him to dial the phone --

THE COURT: That is not proof of fraud and deceit. It might be proof of undue influence but not of fraud and deceit.

MR. MALLOY: I think that there are cases in the Court of Appeals Your Honor, and I have some of them, which indicate that when a party like Fisher -- he was present when the will was signed --

THE COURT: I think the jury can hear all that.

MR. MALLOY: He got the witnesses for the will. He was in a confidential relationship with her.

THE COURT: That all goes to the issue of undue influence, but not to fraud and deceit.

I think sometimes the two issues are confused --

MR. MALLOY: Well, but --

THE COURT: But you have to think of them separately.

MR. MALLOY: Well, but the Court of Appeals in [250] several of the cases have indicated that they would go together.

THE COURT: But they do not.

MR. MALLOY: Fraud and deceit. In other words, that the information which we have established here, that the confidential relationship --

THE COURT: The two things are entirely separate. Sometimes the same evidence established both, but I do not think there is any issue of fraud and deceit here.

MR. MALLOY: I think, if Your Honor please, that you should wait until the other side puts on their thing, because of the fact that there will be some -- I didn't go into detail with him on the thing because I had asked him to be a hostile witness, as a hostile witness, and that was why I was asking these --

THE COURT: I know you did, but I thought it was inadmissible to do that.

MR. MALLOY: So --

THE COURT: That is the reason I stopped you.

MR. MALLOY: I see. Well, that was why I thought so. In other words --

THE COURT: As far as mental capacity is concerned, there is enough here to go to the jury. I do not say that as [251] the trier of the facts. I think there is enough here to go to the jury on undue influence, because undue influence can only be established by circumstantial evidence.

MR. MALLOY: That's right.

THE COURT: I have grave doubt about fraud and deceit. So long as this trial will have to go on, I will withhold my ruling. I am inclined to think, however, that unless something else develops, I will direct a verdict for the proponents of the will on the fraud and deceit.

I am going to deny the motion for the time being.

MR. POSTON: All right, Your Honor.

Now, how about on due execution of the will?

THE COURT: Beg pardon?

MR. POSTON: Due execution of the will.

THE COURT: I am a little bit troubled about due execution of the will.

That is the trouble when people do not call a lawyer in. Nobody testified that the testatrix declared this document to be her will.

MR. POSTON: She wanted them to witness her will.

THE COURT: Yes, I know.

MR. POSTON: That is a declaration.

THE COURT: You gentlemen are experienced lawyers, [252] all of you. Whenever you have a client executing a will, you have the client say, "I declare this to be my will," so there can be no doubt about it.

MR. POSTON: Well, I think, Your Honor, if you say, "This is my will," and you want it executed, that is due publication.

THE COURT: There is testimony that she said to the two witnesses, "I want you to witness my will."

Perhaps it can be inferred from that. Then she signed the document and handed it to the witnesses.

Now it may be that the jury can infer from that, that she intended to declare this document to be her will, but, Mr. Simmons, if you had been present as you should have been, you would never have permitted the execution the way it was carried on.

MR. SIMMONS: Home-made wills are not done that way, Your Honor.

THE COURT: Well, I am not going to direct a verdict either way at this time, on due execution of the will. We will see what happens.

I will deny your motion. You may renew it at the close of the entire case.

MR. POSTON: Thank you, Your Honor.

(Whereupon counsel resumed their places at the [253] table and the following proceedings were held:)

THE COURT: Are you ready to proceed, Mr. Poston?

MR. POSTON: Yes, Your Honor.

I am calling Mr. Fisher.

Whereupon

#### RAYMOND LEON FISHER

resumed the witness stand, having been previously duly sworn, and was further examined and testified:

#### DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. Raymond Leon Fisher.

Q. What is your age, Mr. Fisher? A. I am 49.

Q. What is the nature of your employment? A. I work for the

U.S. Government for the Government Printing Office. I work in the office of the production manager.

Q. How long have you been in the Washington area? A. Since October 13, 1939.

Q. Did there come a time when you became acquainted with Emma O. Lester? A. It was the day I came to Washington. I was introduced to her as a lady that might have some rooms to rent and I was asking fellow employees if they knew a place I could get to [254] stay.

Q. Did you get a room at Mrs. Lester's place at that time? A. I did. I got a room there that day.

Q. Where was that place located? A. That was at 436 New Jersey Avenue, Southeast.

Q. And how long did you rent a room from Mrs. Lester? A. It was one month and a few days, just a little over a month.

Q. Now during this time you rented this room did you become acquainted with Mrs. Lester? A. Yes, very much so.

Q. And will you go into details as to this acquaintanceship? A. This was on a Friday and she asked me Saturday if I would drive her down to the bay Sunday. She wanted to go down. And I had all my meals with her on Saturday and Sunday and we got very well acquainted and being it is hard for her, so got to having me do errands and things right away.

Q. Well, did you do these errands while you were living there and renting a room from her? A. Yes.

Q. Will you tell the type of things you did for her [255] during that time? A. Well, I went to the grocery store and drove her to the bank and Post Office and places. She didn't have anyone to drive her car and she had her own car at that time. But she did not drive herself.

And we also went to visit some of her relatives during that month.

Q. Where? In the city? A. Yes.

Q. Now, did you charge her for this? A. No.

Q. Now after leaving her place where did you live immediately

thereafter? A. I rented a house on First Street just one block from Mrs. Lester's home and my wife came down a month later. Nancy was three months old at the time, and my father drove through and drove them down and we had the furniture shipped so Mrs. Lester lent us enough furniture to get by with until ours arrived.

Q. Well, now, after you moved to this other address, did you continue to do things for Mrs. Lester? A. Yes.

Q. And how long did this continue? [256] A. Oh, it has continued ever since.

Q. And will you tell us generally from then up to the time that she died, just what you did for her? A. I was over to her place at least twice, sometimes three times a week.

I took her to the grocery or went to the grocery for her and I made errands downtown whenever she went to the bay, we would take things down, and she could find a lot of errands to do.

But she really got us started in Washington and after we had lived at this house for one year she had a house she wanted to sell and wanted me to buy it, and I didn't have any money at the time and told her so and the bank wanted 25 percent down at that time to buy a house, so she said, "Well, you give me a personal note for whatever is required and I will tell them that you paid me the down deposit," and so we did and I got my first trust and I worked out most of the \$2,500 that was on the personal note.

Q. You worked -- A. I paid it at a rate of \$25 a month back to her. I don't think I actually paid her half of the money. Most of it was in what she would give me for odd jobs and things.

Q. All right. Now did you work in the yard? [257] A. At the bay, I did. At her home there was no yard to mention.

Q. And what type of work did you do at the bay for her? A. Well, prepared the wall, pushed the lawnmover, and built fence and cleaned and painted and things like that, and boats to keep up.

Q. Now when you worked for her on these things were you paid by the hour or by the week or were you paid -- A. No. Never considered on a dollar-and-cent value at all.

If she was in a notion and wanted to give me something, I would take it. Otherwise there was no thought of actually working for her or anything like that.

Q. Did you ever ask her for money? A. I have never in my life asked her to be paid for anything I ever did for her, no.

Q. Well, when you were doing these chores for her, were you doing it for money? A. No, no, not really.

Q. Why were you doing these chores? A. Well, she was the best friend we had ever had. And one time my son had a mastoid operation real sudden and I asked her if she could let me have \$200 and she did without [258] batting an eye, to take care of that.

And when my mother died in Ohio she let me have \$100 and her car to use to go to her funeral.

Q. Did you pay her back for this? A. I didn't pay her for it. It was just mutual between us as between friends.

Q. I know, but when you had the operation, did you -- A. Oh, yes, I paid that all back.

Q. What was that? Was that the \$200? A. The \$200.

Q. Was that a loan or a gift that she gave to you? A. It was a loan -- I considered it as a loan. I had asked her for it and I paid her back.

Q. Well, now, how long did you work on the seawall down at the beach? A. Well, we have worked on that for 25 years. It keeps needing repairs or extended all the time.

Q. What sort of work did you do on the wall? A. Well, she would bring rock in by the truck from the Gwen Stone Quarries. They would haul about nine tons to the load and it was surprising how quickly we could use those nine tons of rock in putting up that wall.

Q. How far did that wall extend? [260] A. Originally it was just

along the front of the lot, an area of about 105 feet. But now we have had to extend it along the two other sides because of the erosion down there that has taken place and in 1956, the Hurricane Hazel damaged it very badly. Half of the wall was destroyed at that time and it has all been rebuilt since then.

Q. What is the total length of this seawall? A. It's about 270 feet.

Q. How high is this wall? A. It would average a height of about eight or nine feet.

Q. How thick is the wall? A. Well, it is from two to two and a half feet thick.

Q. Who put in the major part of the labor on this wall? A. The original wall was up when I first went down there, but since that time I think I personally have accounted for about half of the repair work.

Q. When you say the original wall, is that the wall that extended all the way around or just the front? A. Across the front.

Q. Do you have any estimate of how many days you put in on that wall over the last 25 years? A. Oh, it is hard to say. I guess it would add up to [261] a hundred days.

Q. Were you paid for this? A. Sometimes I was and sometimes I wasn't. If she had been buying rock and putting out a good deal of money, she wouldn't have it and I wouldn't expect it.

Some other times she would pay me. It was never more than \$10 for the day, though.

Q. Well, now, when you met Mrs. Lester, she was working for the Government, is that correct? A. Yes.

Q. How long did she continue to work for the Government? A. About -- it must have been ten years after I met her, maybe twelve years after I met her.

Q. Then after she -- do you know approximately what year that would be? A. It was in the early 50's. She had been retired I think 18 years when she died. If we would back up on that, it would make it about '49 when she retired.

Q. What did she do after she retired in the way of business activity, if any? A. Well, she was busy every minute of the day and she took care of the apartment house where she lived.

She rented three floors above her floor and she [262] took care of that.

And she had the place at the bay and then she bought some lots and had another cottage built down there.

And during that time she had the house on New Jersey Avenue but she sold that soon after she bought it and she sold another house down on G Street to the D.C. Government. They put a school house up there at the time.

And she had lots at Lake Jackson. We would go up there once in a while to take care of those and she had other lots at the bay that she finally sold, that were in further on the creek, so she could find plenty to do.

Q. Did she keep active all the time? A. Yes, she was always active.

Q. How long did she --

THE COURT: I think we will suspend at this time until Monday morning.

I want counsel to remain a few minutes after the jury leaves. I want to take up a matter with counsel.

Ladies and gentlemen of the jury, we are going to suspend this trial at this time until ten o'clock on Monday morning.

Please bear in mind what I said to you when you were first impaneled. Do not discuss this case with anyone over the weekend, not even at home, with members of your family, and [263] not even amongst yourselves. Do not let anyone speak to you about it.

If anyone should try to, you must report the matter to the Court.

You may be excused at this time and please be back in the courtroom a few minutes before ten o'clock on Monday morning.

The Clerk informs the Court that I have nothing set for the first thing Monday morning, so we can resume the trial at the opening of court.

You may be excused at this time.

(Whereupon the jury left the courtroom.)

THE COURT: Will counsel come to the Bench.

(Whereupon counsel approached the Bench and the following proceedings were held:)

THE COURT: Mr. Malloy, you said you had some authorities which you contend intertwine the issue of fraud and undue influence.

I will be glad to look at those cases if you will give me the citations.

MR. MALLOY: I will get them, Your Honor. (Goes to counsel table and then returns.)

One is Wiggins, W-i-g-g-i-n-s, versus Smith, S-m-i-t-h, [264] 87 U.S. Appeals, D.C., 112. It is also reported at 183 Federal.

THE COURT: 183 Federal.

MR. MALLOY: 183 Federal 2nd, 831.

Hagerty, H-a-g-e-r-t-y, versus Olmstead, O-l-m-s-t-e-a-d, 39 Appeals, D.C., 170.

Duckett, D-u-c-k-e-t-t, versus Duckett.

THE COURT: Duckett?

MR. MALLOY: Yes, Duckett.

THE COURT: I think I know that case.

MR. MALLOY: 77 U.S. Appeals, D.C. 303.

Also it is at 134 Fed. 2nd, 527.

Dewey, D-e-w-e-y, versus Dewey, 90 U.S. Appeals, D.C., 298.

Fowler, F-o-w-l-e-r, versus Gushevsky, G-u-s-c-h-e-w-s-k-y.

THE COURT: What is the citation.

MR. MALLOY: It is 95 U.S. Appeals, D.C., 323.

THE COURT: You do not have the Federal citations to the last two?

MR. MALLOY: Yes, sir, I have. Dewey was 195 Federal 2nd, 779; and the Fowler case is 221 Fed. 2nd, 878.

THE COURT: Very well. I will look at those cases.

[265] MR. MALLOY: Thank you.

THE COURT: Gentlemen, while you are here, have you given any thought, any serious thought to the possibility of settlement in this case? (Settlement discussion was not transcribed.)

(Whereupon at 4 p.m. the hearing of this cause was adjourned until 10 a.m., Monday, March 21, 1966.)

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[268] THE COURT: We will proceed with the case on trial. You may bring in the jury.

(The jury entered the courtroom.)

You may proceed.

MR. POSTON: I call Mr. Fisher back to the stand.

Whereupon

**RAYMOND LEON FISHER**

resumed the witness stand, having been previously duly sworn, and was further examined and testified as follows:

**DIRECT EXAMINATION (Resumed)**

BY MR. POSTON:

Q. Mr. Fisher, when we left on Friday, I believe we were discussing the various chores that you had been doing for Mrs. Lester.

Now, will you state any other types of chores that you did for her which you have not mentioned as yet. A. Well, any interior painting and things like that, I usually took care of.

THE COURT: Speak up so that everyone can hear you. Some of the jurors are quite a distance away from you. Suppose you use the microphone.

THE WITNESS: There was a good deal of just miscellaneous work around a four-story apartment building like that and I did [269] a lot of painting. I think I washed the windows twice a year there every year for 15 years anyhow.

And I would help her get the coal in. She used a coal furnace in that place and she had lots of ashes to take care of and all and it got so that it was too much for her during the latter part of her life and she would always save those ashes so she could haul them down to the bay and put behind the sea wall.

Then I would take her shopping and we always found plenty to do.

There was always jobs that I never caught up with that she had lined up she would like to have me do.

Q. Did you ever do any cooking for her? A. I never had until this last spring and I fixed her breakfast for her. She wasn't feeling very good and I fixed her breakfast some mornings.

Q. Now, Mr. Fisher, can you estimate how much money she gave you over the 25-years that you did these various chores for her? A. Well, she gave me more in items than she did in money.

One time we had been working on the wall at the bay and we were downtown and she mentioned that she hadn't paid me anything so she took me in and bought me a suit down at [270] Toon's Suit Shop. She gave \$75 for that suit for me.

She bought me a hat on a couple of occasions. She bought me a pair of shoes.

She bought my wife a waxer, pressure cooker and things.

She never paid me just for each little item I did. She would pay me for -- she wanted to make it worthwhile when she gave it to me.

And while we were moving, when she decided to move, she told me, well, she said, "I am not going to give you anything for helping me but when we get -- make settlement I will make it worth your while and I want you to put it with your money to get your false teeth."

I am still planning to get false teeth. So she gave us \$250 at that time when she made settlement, but I --

THE COURT: You say \$250 after she moved?

THE WITNESS: After she made settlement, yes, but she hadn't given us anything for two months previous to that and I had been over there nearly every day helping her with getting ready to move, moving her and unpacking, etc.

BY MR. POSTON:

Q. Well, can you give us an estimate of actual cash that she paid you over the 25 years? A. I imagine it would run close to \$2,000.

[271] THE COURT: How much?

THE WITNESS: \$2,000.

BY MR. POSTON:

Q. Can you give an estimate of the average time you worked a week over those 25 years? A. Well, I went over every Tuesday morning and Saturday morning to take her shopping for years. It would usually take about three hours just for that.

And on Sunday, I would say it would average ten hours a week, every week, that I spent there.

Q. Now tell us what you know about her eyesight, Mr. Fisher. A. Well, she has needed glasses for several years because she couldn't read the newspaper without a glass and she would ask me to read over some letters that were written in longhand for her and I had commented that I would take her any time she would go to see about glasses.

But when we went shopping like for groceries, she would do her shopping and I would do mine. She might call me over to ask me the price on a package of meat or something like that, but she made her purchases. She picked them out and she paid for them and she never had any trouble determining what denominations of bills she was giving the cashier or [272] anything like that, so --

Q. Did she have any difficulty telephoning? A. Well, she called us at our house nearly every morning, sometimes every morning -- it was quite often, to make arrangements and ask me to come and do this or ask me to do that.

When I was at her place I made quite a few phone calls for her, when I was there, on business calls and things like that.

But she called in the evenings to different people like if we would miss seeing Mr. Pullman when we went to the bay, she would tell me about calling them and talking to them in the evening.

And she had friends around she would call. I think she could telephone all right.

Q. Did she read the newspapers in the last weeks of her life? A. She took the newspaper all the time she lived in the S Street house and I cancelled the subscription two days after she died myself.

And she used a glass but she went all through that and she would cut every coupon out of that newspaper, she would check it close enough for that, and she would save them for me either to trade in for herself or for us and she always [273] knew more about it than I did.

Q. Now during your association with her, you had many conversations with her, did you not? A. Yes, she seemed to like to talk all of her troubles and things over with me.

Q. From your observations and your close association with her, did you observe any irrational actions or words on her part? A. No.

Q. Was she coherent in her conversation? A. Oh, yes.

MR. MALLOY: If Your Honor please, I think he did cover this. He did cover this before I think.

THE COURT: Well, we will let it stand.

BY MR. POSTON:

Q. From your observations what was her mental condition? A. She was very sharp.

I can tell you about just the week before she died, we went down to Annapolis. She paid all her taxes for the year and took everything into consideration. It had been bothering her for sometime that she had been having to pay a garbage collection item on her tax bill when the property she had there had been fenced across and the trucks couldn't even get [274] to her place so she said, "I am going around there" --

Q. What place are you speaking of? A. The place at the bay, the property was in litigation and there had been a fence put across her drive that the trucks couldn't get in.

So she went around to the Sewage Commission and made a complaint and they moved her on to about three different other places and finally we went clear up to Glen Burnie, Maryland, to see the persons in charge of that part and they gave her a refund of between \$40 and \$50 for over the four years, for work they hadn't accomplished, and when anybody can talk the State of Maryland out of \$50, I don't think there is anything wrong with her mind.

Q. Well, now, you saw her on July 1, 1965, did you not? A. I did.

Q. In your opinion was she at that time of sound and disposing mind and did she have at that time the mental capacity, in your opinion, to make a will and a valid contract? A. She did.

Q. Now, Mr. Fisher, there has been testimony about a negotiation of a contract for a grave monument.

Do you know anything about that? A. She has said for sometime --

[275] THE COURT: Do you know anything about it?

THE WITNESS: Yes, I do.

BY MR. POSTON:

Q. Tell us about it. A. She --

THE COURT: No, no. Ask a definite question.

BY MR. POSTON:

Q. When was this -- to your knowledge, when was this contract negotiated? A. It was I think about the 19th of July. We had stopped by Wilson and King on Pennsylvania Avenue there at Barney Circle and she wanted to look at the stones.

She had always said that she could never rest happy until there was a stone on her mother's grave.

Well she talked over and picked out the stone she would like to have and then she talked to Mr. Jones about the deal and told him what she would like to put on it and he told her it would cost her about \$525 to put the stone that she wanted in Cedar Hill.

And then she asked him about individual markers to carry the names of her father and mother and her brother who had died, and he told her that would be \$75 additional for each of those.

[276] THE COURT: When you say "he," whom do you mean?

THE WITNESS: Mr. Jones told her --

THE COURT: Who is Jones?

THE WITNESS: He is the salesman for Wilson and King, funerals.

THE COURT: Wilson and King?

THE WITNESS: The tombstone man.

THE COURT: All right.

THE WITNESS: And when they got through she said that she would like to make the deal. And it was rather amusing, he said, "Well, we will have to have a deposit on this order before I can cut the stone."

And she said, "Well, here is \$10 for the deposit." She handed him a \$10 bill. He looked at her and then he looked at me and hesitated a little bit and he said, "All right."

And he filled out the contract and went ahead and then we ran into a stumbling block. She didn't own the lots. They belonged to her brother Walter and her sister Elsie.

Elsie was at that time in Scotland or some place on a trip, so I took the papers to Walter up at the Central Armature Works, and talked with him and we got him to sign the papers so she could put the stones on his lots.

BY MR. POSTON:

Q. Now, what was Mrs. Lester's relationship with her sister [277] Marie, if you know? A. Oh, for the past 11 or 12 years they hadn't spoken and she hardly ever mentioned her.

Before that they had been pretty good friends because I would take her things -- I would drop things off at the house for her and she was living in a house that Mrs. Lester owned at that time.

But I didn't know her too well.

Q. Do you know what caused the separation between the two sisters or -- A. Oh, it was at the -- during the war and I took Mrs. Lester up to the OPA Rent Control Board. She had made an application to raise the amount that Marie was paying her for the rent of the house.

And I didn't hear the conversation up there, but I understand that --

MR. MALLOY: I object, if Your Honor please.

THE COURT: Objection sustained.

BY MR. POSTON:

Q. Who was renting the house at the time? A. Marie Bailey was renting it from Mrs. Lester.

Q. To your knowledge did she oppose this application for an increase in the rent? [278] A. She did.

Q. Was this the reason they fell out? A. Marie Bailey made the claim that the house was hers, to the Rent Control Board, and they would not hear the case because there was -- not settled definitely, so Mrs. Lester went to a lawyer to get things straightened out to prove that the place was hers.

Q. Was this the reason that the two sisters fell out? A. Yes.

Q. Do you know who had the deed to the property? A. Mrs. Lester had the deed. She had paid the insurance. She had paid the taxes. She paid the down payment. And the rent that Mrs. Bailey had paid had been applied to the first trust as -- rent payments had paid the first trust on the house.

Q. But who paid the payments on the first trust? A. Mrs. Lester paid them.

Q. What was Mrs. Lester's relationship with Walter Bailey, her brother? A. She liked Walter very much. She complained about him being rather indifferent, but she laid it to the fact that he had a big family and he had a job that confined him a whole lot and Walter didn't like to go places. When he was home [279] he liked to stay home and she didn't hold any resentment about it.

Q. What was her relationship with her sister Elsie? A. Well she felt bad because Elsie had left her home and taken her father and mother with her, but she never spoke harshly of Elsie.

She complained about her, she could take a trip around the world or to Europe, but she couldn't take a trip down to visit with her and things like that, just griping, it was no serious complaints.

Q. In your presence did Elsie ever make any complaints to her? To Mrs. Lester, that is. A. Well, when -- nothing serious, but when Elsie was taking care of her she complained that she had to walk and reach over the dog all the time in order to get up to the bed and she

complained a lot about roaches and things that were around the place, but they didn't -- they didn't fuss too much.

Q. Well, did Mrs. Lester resent these complaints? A. Yes, she always did. She would talk them over afterwards and things and she said that folks said that there was nothing for them down at her place so -- I know one time her brother was there and his wife set in the car and wouldn't come in. Mrs. Lester never forgave her for that. She [280] thought it was an insult.

THE COURT: Never forgave her for what?

THE WITNESS: For not coming in the house. She thought it was an insult.

BY MR. POSTON:

Q. Were there any complaints made about the dogs -- the dogs of Mrs. Lester?

THE COURT: Complaints by whom, Mr. Poston?

BY MR. POSTON:

Q. By the brother or the two sisters? A. Oh, I think they liked the dogs all right. They -- Mrs. Lester insisted when she went any place to take the dogs with her and they would take up more than half of the back seat of the car, or if she went visiting, she liked to take the dogs and people didn't like to have a couple of big dogs and didn't like them all over the place, and Mrs. Lester would resent it if they would try to have her leave them out or tell her to leave them in the kennels or something like that.

Q. Would they tell her to leave the dogs in the kennels? A. I don't know for sure. That was her statement to me several times. If the dogs weren't welcome, she wasn't welcome either.

MR. POSTON: Will the Court indulge me just a moment?

[281] THE COURT: Surely. Take whatever time you need.

BY MR. POSTON:

Q. Now during the last several years of her life, did she visit with

her brother Walter at his home? A. I never took her to his home in the last 12 or 15 years.

Q. Did she go in any other manner than having you take her? A. I don't believe she was ever there.

Q. Did she visit at the home of Elsie Bailey during the last several years? A. Yes, I think about three times a year we would go up, maybe four, just on short visits. She would take her things and Elsie made cookies for her at Christmas time and we would go up at that time and visit.

But she never stayed. I always brought her back when I came back.

Q. And was there any particular reason why she didn't visit Walter at his home during the last 15 years? A. I never knew why. I would have taken her if she had asked me to take her up there.

Q. Did she visit other people during the last several years of her life? [282] A. Yes, she visited at the bay considerable when we went there and she visited with Mrs. Tull. She visited with Mrs. Swenson. She visited with some other ladies and she was at our place several times.

Q. Well, during the last year of her life did she visit at your home? A. She wasn't during the last year.

Q. When -- A. She had, I remember once previously --

THE COURT: No, just a moment. I think you have to confine yourself to answering questions.

BY MR. POSTON:

Q. Did she in the last, say the two years of her life, visit at your home? A. Yes. I worked at Sears and Roebuck and had a discount card and she liked to take advantage of it, so we would go up there and shop quite a little bit when she wanted to get materials and before that her sister Elsie had --

Q. Excuse me. What does that have to do with her visiting at your home? A. Oh, I am sorry. I lived about two blocks from there and we would always stop at our house and have coffee and things at the time.

[283] And her sister Elsie lived out there for several years and every time she visited her I would take her by my house and --

THE COURT: Now, just a moment. You have answered the question. Wait until another question is asked.

BY MR. POSTON:

Q. Now, there has been testimony in this case, Mr. Fisher, about dog poisoning or animal poisoning.

To your knowledge was there any poisoning of animals in Mrs. Lester's neighborhood? A. Yes. About a year ago several dogs were poisoned in her neighborhood and she had several cats too at the time and they were poisoned. We found one of them dead later and we found one in a neighbor's yard dead.

Q. Did she ever mention to you a visit by a man whose name is Harold Haynes? A. Yes. She said that her -- she had asked her brother for some advice on selling the house on New Jersey Avenue and he had had a contract of some kind drawn up. I never saw this contract. And he was going to have his real estate representative who happened to be his brother-in-law, I believe, come by and talk to her about it, and they were trying to have her accept a large trust.

[284] Q. Just say what Mrs. Lester told you, unless you have other personal knowledge. A. All right.

And she rather resented him coming by --

THE COURT: No. Just tell us what she said to you.

THE WITNESS: Well, she said, Mr. Haynes came by and that she cussed him out and told him off.

BY MR. POSTON:

Q. Did she say anything else about what he was doing? A. She said that he was trying to get her to sign a contract that would carry a big trust and she wanted cash because she wanted to buy another piece of property and that she was too old to fool around with notes and she was afraid it might come back on her.

Q. Now, what was her relationship with Raymond Bailey's wife,

Bebe Bailey? To your knowledge. A. She claimed she never liked her very well. She liked Raymond immensely, but Bebe seldom accompanied Raymond when he did come by the place and she thought that Bebe led him around by the nose, as she said, all the time and she didn't like her very well.

Q. Well, did she make any other comments about her? A. She said she talked too much and said she would take [285] him down to the Carolinas to visit all the relatives down there but they could never get down to take her any place or to go to the bay with her or anything like that.

Q. I am going to show you this document and ask you to identify it, if you can, Mr. Fisher. A. That is the title to a trailer that I own and the --

THE COURT: It is what?

THE WITNESS: It is a title to a trailer that I own and the current registration card.

BY MR. POSTON:

Q. Where did you get this trailer? A. I purchased that trailer from Mrs. Lester, March the 22nd, 1955.

THE COURT: March 22, 1965?

THE WITNESS: No, '55 eleven years ago.

THE COURT: Oh, '55.

MR. POSTON: Your Honor, I offer this in evidence. It is Plaintiff's Exhibit 2, I believe.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 2.

THE COURT: What is the purpose of offering this.

MR. POSTON: Well, Your Honor, if Your Honor recalls, Bebe Bailey testified that six years ago Mrs. Lester had said that she was leaving Raymond only this trailer and she had [286] already transferred it eleven years ago.

THE COURT: Very well. Let it be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 2 marked in evidence.

(Plaintiff's Exhibit No. 2 received in evidence.)

BY MR. POSTON:

Q. Now, Mr. Fisher, there has also been testimony that some of the caversors were -- well, testimony that Mrs. Lester was unhappy with the services of Mr. Simmons.

Do you have any personal knowledge as to their relationship?

THE COURT: Well, now, how is that relevant to the issues of this case?

MR. POSTON: Well, other than the fact that it was admitted into evidence on direct, Your Honor.

THE COURT: I think we ought to confine ourselves to the issues of this case.

MR. POSTON: All right, Your Honor.

BY MR. POSTON:

Q. Mr. Fisher, did you at any time, at any place, either directly or indirectly suggest or intimate to Mrs. Lester how she should dispose of her property? A. I never did.

[287] Q. Did you ever threaten or attempt to intimidate her or in any way directly or indirectly influence her in the manner in which she should make disposition of her property by will? A. I never suggested anything.

Q. Did you in any way directly or indirectly make misrepresentations to her to cause her to make disposition of her estate in any manner? A. I did not.

Q. To your knowledge, when she made her will was she acting under the influence of anybody? A. No, she was not.

MR. POSTON: No further questions. Your witness.

THE COURT: Mr. Malloy.

## CROSS EXAMINATION

BY MR. MALLOY:

Q. Mr. Fisher, with reference to the loan which you said Mrs. Lester placed on the house that you were buying, when was that? A. That would be in about 1942.

Q. When you came to Washington on October, 1939, and you were employed at the Government Printing Office? A. Yes.

[288] Q. By the way, what is your grade and salary at the Government Printing Office? A. I am a technical aid. It is a grade 5 up there, and I make about \$9,000 a year.

Q. \$9,000 a year? A. Yes.

Q. You have stated that you did work at Sears and Roebuck. What type of work was that? A. I was a salesman in the garden shop during the spring season and things like that.

Q. How long were you employed there? A. Four years.

Q. For four years.

What period of time did that cover? A. That was from 1949 to about 1953.

Q. How many hours a day did you work at Sears? A. Well, from ten to three.

Q. From ten until three? A. Yes.

THE COURT: What were your hours at the Government Printing Office?

THE WITNESS: Five o'clock in the evening until 1:30 the following morning.

[289] BY MR. MALLOY:

Q. Did you ever work for the Capital or D.C. Transit Company? A. Yes, during the war I drove a bus for them for -- I imagine it was six years, 1940 to '46, I would say.

I worked parttime for -- until I got in ten years so I could get Social Security coverage.

Q. How long or what were your hours when you were driving the bus? A. I worked from six in the morning until ten in the morning.

Q. Was your employment at the Government Printing Office always nighttime, from five p.m. until 1:30 a.m. the next morning? A. For 26 years I have worked nights.

Q. Now, how did you find time working from -- at Sears and at the Capital Transit Company, and doing your nighttime employment, to give so much time and attention to Mrs. Lester? A. Well, I didn't work for them both at the same time, of course, and I didn't have too much time at that time, but since then I get up about nine o'clock in the morning. I have eight free hours up until five o'clock in the evening.

So we would often go down to the bay at ten o'clock. [290] I would work for four hours on the wall, and come back up, have dinner. Then I would go to work.

Q. With reference to this house, you said that you went with Mrs. Lester to the building association and they wouldn't give you, or give sufficient trust on the place and you signed a note then to her for \$2,500? A. It wasn't just exactly that way.

They required a deposit at that time of 25 percent from the purchaser of a piece of property, and I did not have the 25 percent.

So Mrs. Lester said if I would sign a note with her for that, she would tell them that I had already paid her the down payment on the property and I paid them both off together. I paid the bank and I paid her.

Q. So that you signed the note to her order for \$2,500? A. Yes.

Q. And then she told the building association that you had paid her \$2,500? A. Yes.

Q. Whereas you had -- A. I had not paid her a cent.

Q. You had promised to pay her in the note? A. That's right.

[291] Q. But had not paid her? A. Yes.

Q. Were you with her at the building association when she made

that statement? A. I don't remember being asked directly but she said I had -- I had made the down payment to her.

Q. You heard her say that? A. Yes, I heard her say that.

Q. To the -- A. To the representative that --

Q. To the representative.

What building association was that, the Metropolis? A. That was the American Building Association at Third and Pennsylvania.

Q. American? A. American.

Q. Now, I believe you said that you hadn't paid that off then, or you only paid a part of it off, is that right? A. Oh, no. I worked -- if I had worked some for her, she would -- when I would go to pay her the \$25, she would say, "Well, you only owe me \$15 this time," so I would pay that.

But it was paid off within five years.

Q. But it would be by saying that you did some work or -- [292]

A. At that time, yes.

Q. Well, now then, did you take that into consideration when you told Mr. Poston that she had paid you about \$2,000 for this work that you did for her? A. No, that was not taken into consideration.

Q. So that then -- A. That was --

Q. The \$2,500 or whatever that would be hadn't been paid would be added to the \$2,000? A. I would say maybe the part that I worked out could have been included in that \$2,000, but that was a business transaction and it was taken care of in that fashion.

Q. What was the price of the property? A. \$8,500.

Q. \$8,500. So that was there a loan then from the building association of \$6,000 or approximately that? A. Yes.

Q. And then the \$2,500 note which Mrs. Lester said you paid? A. Yes.

Q. Now did there come a time when you sold that property? A. Yes.

[293] Q. When was it sold? A. In 1949.

Q. And then you -- how much did you get for it? A. I got \$50 more than I paid for it.

Q. Then did you use that as your down payment on your house in Virginia? A. Yes.

Q. Now, Mrs. Lester wasn't too happy about you moving to Virginia, was she? A. No. She thought it would be pretty far away at the time but it only took 20 minutes to come over to her place and afterwards she liked the place and even looked at a house near us where she thought a whole lot about moving out there to be near us.

Q. When she came to moving from New Jersey Avenue to 1525 S Street, Southeast -- A. Yes.

Q. She had discussed the matter of the property with her brother Walter, did she not? A. Yes.

Q. And did not the brother Walter tell her that he wasn't too familiar with matters but that Mr. Haynes was a lawyer and that he could explain it to her? [294] A. Yes.

Q. Isn't that why Mr. Haynes went over to see her? A. Yes. They submitted a contract to her or somebody did and he was to go over and look at it. I didn't see it.

Q. You don't know whether Mr. Haynes submitted a contract? A. No, I don't know who did.

Q. Now, with reference to this paper writing on July the 1st, 1965, you had purchased the forms at the Woodhouse Printing Company? A. Yes.

Q. And you took those forms over to Mrs. Lester? A. Yes.

Q. And then you said that she asked you to get two witnesses and you called your daughter and your son-in-law, or your daughter may have called your son-in-law after the call to you, and as a result of that they both --

MR. POSTON: Are you testifying, Mr. Malloy?

MR. MALLOY: No. This is cross examination.

THE COURT: Just a moment. Finish your question.

BY MR. MALLOY:

Q. You had the son-in-law who at that time worked for the Marlo Furniture Company, I understand, and they then went [295] to the premises at 1525 S Street, Southeast, and you were waiting on the premises for them, and when they arrived you opened the door and led them into Mrs. Lester? A. Yes.

Q. Is that correct? A. That is correct.

THE COURT: Now I will hear your objection.

MR. POSTON: Pardon?

THE COURT: I say now I will hear you if you wish to object.

MR. POSTON: Objection, Your Honor, to that long and involved question involving several facts.

THE COURT: I think it is permissible on cross examination.

BY MR. MALLOY:

Q. Now the dog was jumping around and you then took the dog and went about 20 feet away when your daughter Nancy and her husband George, your son-in-law, signed the paper or witnessed the paper writing, is that true? A. That is true.

Q. Now you stated that you did not know who typed that paper on the form which you had procured at the Woodhouse Printing Company? [296] A. I never saw that form from the time that I gave it to her until she called me over that morning

Q. But that morning -- now following the signing of this paper writing -- A. Yes.

Q. You said that she gave it to you and you put it in your pocket and then took it over to your home in Virginia, Arlington, Virginia, is that true? A. That is true.

Q. And that you then kept the paper writing in your home and in your sole and exclusive possession until after the death of Mrs. Lester on September the 1st, 1965. A. I did that.

Q. And that during that time you did not tell Walter Bailey, Elsie

M. Pinney, Marie Bailey, or any of the other members of the family that you had it in your possession, is that true? A. That is true.

Q. Until after her death? A. That is true.

Q. Now, with reference to this paper that -- with reference to the headstone, you said that you went to this monument concern about July the 19th, 1965, is that true? [297] A. It was about the middle of July. I am not certain of the date.

Q. And as a result of your checking there, you ascertained that it was necessary to procure the consent of the owners of the lot, Walter Bailey and Elsie Pinney, is that right? A. That is true.

Q. Now, then, as a result of that, you got a paper and you took it to Walter Bailey at the Central Armature Works here on Sixth Street, Northwest? A. Yes.

Q. Did you not? A. I did that, yes.

Q. And that was necessary in order that the headstone could be erected on the lots which he and Elsie owned? A. That is true.

Q. Did you have any trouble with Mr. Bailey? Did he in any way refuse to sign? A. No. He said it wasn't necessary for her to do it herself, but if she wanted to do it that way, it was all right.

Q. And he readily signed it? A. I wasn't there five minutes.

Q. You were the one -- Emma wasn't with you at that time, was she? [298] A. She did not go up.

Q. You had gone to see Mr. Bailey with it. Now that -- A. I am not sure, but I believe that she had contacted him on the telephone and had discussed it, but it wasn't -- it was the next day that I went up to see him.

Q. But in any event, you didn't have any difficulty in procuring his signature? A. Oh, no, and we needed the dates of her father and mother's death and also she had called Elsie to find those and Elsie said she would have to have Marie get them from the family Bible and they were furnished within a few days and we took them back to the monument place.

Q. Now, that was then -- it was sometime after the middle of July, 1965? A. Yes.

Q. Now this paper writing which you spoke about, which was signed by your daughter and son-in-law -- A. Yes.

Q. Had been dated on July the 1st, 1965. A. That is correct.

Q. But you didn't say anything to Mr. Bailey about the paper writing. A. Oh, no.

[299] Q. Now, with reference to this headstone, was there any discussion or any statement you said that it was necessary to have for the brother? Is that the brother Howard? A. Yes.

Q. Was there any particular identification or any insignia of any kind suggested to be placed on the headstone? A. On the family marker, they placed the Masonic emblem, I believe it was on both sides, because her brother Howard and her brother Walter were both members of the Masons.

Q. And Emma wanted that because of the fact that the brothers were members of the Masonic order and she wanted to be buried in the family lot? A. Yes, she put the name Bailey on it and put the Masonic emblems on it, even though her name was Lester and she was not a member of the Masons, and she wanted to be buried there.

Q. And she wanted to be buried with the family? A. Yes.

Q. And she had been talking about that for quite sometime, had she not? I mean it was a matter that was apparently very important to her? A. Yes. She had a -- she said that she had approached members of the family about putting up a stone, but none of [300] them seemed to be interested and so -- that she couldn't die happy until there was a stone on her mother's grave and she decided to go ahead and put it up herself.

Q. At that time she had some trouble with this stroke, had she not, and had been taking digitalis? A. Yes. Doctor Summerfield had told her she would have to take those tablets because of clotting of the blood.

Q. And she -- they didn't set too well with her, did they? A. They made her very sick.

Q. And -- but that was -- before that time, it was sometime in June or so before -- when he had prescribed the digitalis? A. Yes. As soon as she started taking those she was sick at her stomach and felt worse and all and we went back to him and he had me cut the tablets in two and take them half a tablet twice a day.

Q. He had you do that? A. Yes. I did that.

But they still made her sick and she finally quit taking them and she said she would rather be dead than to be sick all the time and as soon as she quit taking them, she improved.

[301] Q. She improved when she quit taking them? A. She wasn't sick at her stomach any more.

Q. Now, that was before the incident that you went to see Walter? A. Oh, yes.

Q. So that she knew she was suffering at that time and you knew she was suffering? A. Yes.

Q. Now with reference to Elsie, you said that she complained because Elsie complained about roaches around the place?

Is that right? A. Elsie is a very neat, nice housekeeper and Mrs. Lester was rather careless and Elsie made no bones of pointing it out to her and they would argue on that matter.

Q. But that was merely as a sisterly -- A. It was nothing.

Q. There wasn't any -- A. Hard feelings.

Q. -- vehement argument, was there? A. No.

Q. It was a sister saying to her sister, "You ought to tidy up yourself and the place and not have these roaches running around here."

[302] A. They had a custom, Mrs. Lester particularly, of using rather rough language and it would sound pretty serious, but it didn't amount to much.

Q. You mean that because of the fact that Mrs. Lester would say,

"G.D.S.B.", etc.? A. Yes. She really expressed herself vehemently to anybody any time.

Q. Well, she did use that language, "G.D.S.B."? A. Yes.

Q. Now she did like Walter very much, didn't she? A. She did, yes.

Q. And she liked Raymond very much, didn't she? A. Yes, she liked him very much.

Q. And as a matter of fact, except when Elsie complained about the roaches running around out of the toaster, and what not, she liked Elsie very much, didn't she? A. Yes. She liked Elsie. She gave her a television. She was very good to her and they exchanged Christmas presents and Elsie baked Christmas cookies and things for her and they got along as well as most other sisters would.

Q. Now, in addition to the positions which you mentioned, at Sears Roebuck and at the D.C. Transit Company, did you not also have a position of making deliveries for a [303] publishing concern? A. A friend of mine has a -- Stanley Adams is his name -- has a small print shop right near our place, and he don't have a big enough business to have a man make his deliveries and for the last two years, he will call me in the morning or I will check with him, and we will make deliveries if he has going over to town and things like that.

Q. Now you said that you did not take her to visit Walter, but you did take her to visit Elsie? A. Yes, I did.

Q. Now, as a matter of fact, on these visits to Elsie, which you mentioned, is it not a fact that you were making deliveries for Mr. Adams and that it was on your way and that you would drop Mrs. Lester off at Elsie's place and then pick her up after you had finished the job that you were doing? A. I did on several occasions, but most of the trips I made up there were on Saturday or on Sunday when I wasn't working.

Q. Well, now, you said on several occasions you did go there --  
A. Yes.

Q. -- in connection with your business? A. Yes.

[304] Q. But you have said in answer to Mr. Poston's question that you only went there four times, three or four times, to Elsie in the last year. A. Last year.

Q. Last year? A. In the last years.

Q. Did you not answer Mr. Poston when he asked you how many times you visited Elsie that you said three or four times and that you had not visited Walter at all with her? A. I didn't mean to because we have been at Elsie's place I imagine 20 times in the last few years.

Q. And on many of these occasions then it was in connection with your employment for Mr. Adams? A. She would ask me if I was going up that way, that she had a package or something to be delivered there.

I would say I did and then she would want to know if I could come by and pick her up and take her up at the same time. She didn't want to make a special trip out of it.

Q. As a matter of fact, isn't that why when Elsie would call her and ask her to visit her, she would say if she could see if it was convenient to you to drop her off? A. That's right. She had no other way to go.

Q. And Elsie had no other way to go either? [305] A. No.

Q. Now, as a matter of fact, isn't that the real reason for the absence of the too frequent visits, the fact that Mrs. Lester couldn't drive and Elsie couldn't get there except by a long tedious way? A. That's right.

Q. Now, you said that Mrs. Lester didn't talk about Marie much.

Now this matter, you have stated that these payments for rent -- did you know anything about the original agreement between Mrs. Lester and Marie, her sister, when she went into this place? A. No. That had been made about -- I believe they said 1927 and I didn't know her until '39. It was just --

Q. So that -- A. Comments that I would hear now and then.

Q. So that you only had, if you had anything with it, whatever Mrs. Lester said? A. That's right.

Q. You never talked or discussed it with Marie to get her side of the situation? A. I never did.

Q. Now, you stated that when it went to the Rent Control [306] Board, that they refused to hear it because they did not know who was the owner; Marie said she was the owner and Mrs. Lester said she was the owner. A. That is what I understood from what Mrs. Lester told me.

Q. And that, therefore, her request was denied by the Rent Control Board? A. It was denied and she went to a lawyer named Shehan to take the matter up and he settled it some way to their satisfaction. I don't know how it was done.

Q. Well, as a matter of fact, didn't he represent her before the Rent Control Board, and had tried to get the increase when the Board turned it down? A. He may have. I don't know.

Q. Now, that was about the wartime of 1942, you said, when they had this discussion. A. (Nods affirmatively.)

Q. Did Mrs. Lester say anything to you about Marie's failure to fix her dresses as she had been for thirty years previously? A. No. I knew that Marie made her clothes and then about that time she changed and had a Mrs. Kautz up at Mount Airy -- has done her sewing ever since, and I think -- she was a friend of Lillian Bailey and they got them together and [307] about two months before she died she had four dresses made up at Mount Airy, Maryland.

Q. But she did tell you that Marie had made her dresses for a long time? A. Oh, yes.

Q. And did she tell you that Marie wasn't able to do it then because she had procured a wartime position and that -- A. No, she never told me why or anything.

Q. She didn't tell you why? A. No.

Q. And you inferred then, since she didn't tell you, that it was because of the fact that Marie had -- A. They weren't speaking, yes.

Q. And you thought that was due to the fact that they each claimed to be the owner of this property? A. That was my understanding of the deal.

Q. Now, as a matter of fact, with this you had said that Mrs. Lester made the payments on the first trust.

You don't know whether Marie paid Mrs. Lester or made the payments on it at all, do you? A. No. Marie paid Mrs. Lester and Mrs. Lester paid the trust.

Q. Oh. So that when you told Mr. Poston that Mrs. Lester [308] paid the trust, I certainly got the impression that you were saying that Mrs. Lester made the payments, so now it is Marie paid Mrs. Lester? A. You are all wrong.

Marie paid Mrs. Lester every month rent and out of that rent money, Mrs. Lester made the payment to Perpetual Building Association on the first trust of the property.

Q. But did you know that Marie had been making the payments until Mrs. Lester suggested that she give the book for the payments to Marie and that it be paid that way?

Did you know that Marie had been making payments for some years? A. No.

Q. Now, you said that you thought that Mrs. Lester was resentful of the fact that Elsie had taken her father and mother from the 436 New Jersey Avenue place.

That occurred prior to your entrance on the scene, did it not? A. Yes, but I knew Mrs. Lester's father --

THE COURT: Just answer the question. Don't go any further.

THE WITNESS: Yes.

BY MR. MALLOY:

[309] Q. And Mrs. Lester, as a matter of fact, took a rather pos-

sessive attitude of most people who came in contact with her, did she not, and liked to be listened to? A. She did, yes.

Q. And that might have accounted for the fact that she complained about Bebe talking too much? A. Yes, I think it might have.

Q. Now, as a matter of fact, isn't it a fact that Bebe did not like to take her children into the apartment, because of these roaches and other things that you have complained about -- or the dog running around and licking the children, etc.? Isn't that true? A. It could have been. I know she hadn't been to her place for sometime and she did not accompany her husband when he came down.

Q. Now, with the other, didn't you call -- when you wanted to talk with Raymond, didn't you call and Bebe would answer the phone and be pleasant? A. I always called him at the laundry where he worked, when I was there during the day, because he would be there, or leave a message for him to call back, and she worked in another establishment and I may have called there twice in the ten years, but that is all.

[310] Q. Called her to tell Raymond something -- A. Yes.

Q. -- that was wanted to be done? A. Yes.

Q. Now with reference to this move from 436 New Jersey Avenue, Southeast, to 1525 S Street, Southeast, you said that she paid you \$250?

Is that right? A. Yes.

Q. Do you know whether she offered Raymond any payment?

THE COURT: I think that is entirely irrelevant, Mr. Malloy.

MR. MALLOY: Well, no, I think it is important, if Your Honor please, because of the fact he has said that he did everything for her, because of his love and affection for her, not for any payment, and --

THE COURT: Now, I am going to leave out the question as to whether she paid Raymond or anybody else.

MR. MALLOY: Oh.

THE COURT: That is what I have in mind.

MR. MALLOY: Oh, I see. I am sorry. All right.

BY MR. MALLOY:

Q. Now, with reference to the -- you said dogs, was [311] there two -- two dogs? A. Well, they varied from one to eleven over the last -- at times there was eleven and at times there was one. I mean it varied.

Q. And this is -- what was the nature of this apartment? One or a one-and-a-half room apartment? A. It was in a four-story house.

Q. But where she lived. Confine it to the part occupied by Mrs. Lester. A. There was two large rooms, a bathroom, and a hallway.

Q. And this place was pretty well cluttered up with odds and ends and what not, was it not? A. There was no junk there, if that is what you mean. There was no junk, but there was seasonal things from the apartments upstairs and there was extra refrigerators and during the war she had an extra washing machine and there was two or three desks piled up there and she had a shed out back, but anything that would deteriorate from weather, she kept in that house and she had it really stacked full of things.

Q. That is what I said, it was pretty well cluttered up. A. Oh, yes.

Q. And it was rather difficult to gain ingress or egress from the place, was it not? [312] A. Well --

Q. In other words, you had -- A. Only from the large room. The hallway, she would go around through the hallway to the kitchen, but it was pretty crowded in the whole apartment, yes.

Q. And the dog had the run of the whole place? A. Yes.

Q. Or dogs? A. Yes.

Q. Now on this occasion when they had the eleven there, does that include the two -- the male and the female dog and the nine pups? A. That's right.

THE COURT: I think we are spending too much time on the size of that room.

MR. MALLOY: Well, they have denied, if Your Honor please, that this --

THE COURT: I think it is immaterial. We are getting into minutia. I think we will take our usual mid-morning recess and give the jury a short respite.

(Whereupon the Court took a short recess.)

[313] THE COURT: Mr. Malloy, you may proceed.

(The witness resumed the stand.)

BY MR. MALLOY:

Q. Do you know if Mrs. Lester had written a will previous to this will? A. Yes, she had.

Q. When was that, if you know? A. In about 1952 she wrote a will just previous to her entrance into the hospital for a cancer operation.

THE COURT: Speak up so we can all hear you. Will you repeat your answer?

THE WITNESS: Yes, she had. In 1952 she wrote a will previous to her entrance into a hospital for a cancer operation.

BY MR. MALLOY:

Q. Was that at Providence Hospital? A. Yes, she was at Providence Hospital.

Q. Did you have a copy of that will? A. I did.

Q. You did not have the original will? A. I had the original will. There was no copies that I know of.

Q. You had the only one? [314] A. I had the only one.

Q. Did she later call upon you to bring that to her so that it could be destroyed? A. I doubt if it ever was destroyed. She asked for it back three times during that -- those years.

The last time she asked for it back was the first week of May when she had me get her the new forms.

I never saw it after that.

THE COURT: Well --

BY MR. MALLOY:

Q. You said you had it.

THE COURT: Did you return it to her when she asked for it?

THE WITNESS: Yes.

THE COURT: You did give it back to her?

THE WITNESS: Oh, yes.

BY MR. MALLEY:

Q. Do you know whether or not she destroyed that will? A. I do not know.

Q. Do you know why she asked you to return it to her? A. She wanted to make some changes in it.

Q. As a matter of fact didn't she have a disagreement or a discussion with your wife about you spending too much time with Mrs. Lester and not enough time at your own home? [315] A. There was at one time a disagreement about that and for several months we didn't see Mrs. Lester and finally one Sunday morning she came up to the front door and came in. She apologized. She asked us did we want to go to the bay that very day and my wife said if she would go that far, we would go too, so everything was happy after that.

Q. Now, you said that Mrs. Lester was particularly fond of her brother Carol. A. Yes.

Q. Is that true? A. That is true.

Q. She -- would you say that she preferred him over all the other members of the family or equally well or -- A. No, I think he was her baby brother and she was a little more fond of him maybe because of that, because she had another brother Howard that died and they had more contact than anyone else in the family. She liked him very much also.

Q. Didn't Walter always keep in touch with her? A. Yes.

Q. Didn't Walter do all of the electrical work and plumbing both at her house on New Jersey Avenue and also down on the bay? A. Yes, he took care of that part of the work.

[316] Q. He did all of it? A. Yes.

Q. Now, with reference to the work on the bay property, they all --

the whole family cooperated, did they not, on the work in connection with it -- the cement in the seawall? A. They may have in the first years that she had it, but here recently they hadn't too much and she always prided herself on that she had never had to turn to her family and ask for any assistance of any kind.

Q. She did say that? A. She prided herself on that point.

Q. Do you know her handwriting? A. I do.

Q. Do you know if her sister Elsie had advanced any money to her?

A. I never heard of it if she had.

Q. Do you know whether or not she asked Walter to advance any money when she was in the litigation down on the bay? A. I didn't know of it.

Q. Now, as a matter of fact, you or Mrs. Lester or none of the family had been in this premises since 1953, on the bay. Wasn't it closed, fenced off and didn't occupy it? A. No, you are wrong there. The litigation didn't [317] start until 19 --

Q. '63, I mean

Pardon me. I said '53. I mean '63. A. We had been in. We had had to repair the wall a few times. We went in, oh, three or four times a year to check and see whether the -- anybody had broken in or whether it had been --

Q. I am talking now about going in to go into the premises, not to merely check to see whether -- A. No, we had to climb over a fence and go in.

Q. You would climb over a fence.

In other words, the place was fenced off? A. It was fenced off. We could not take a truck or a trailer or a car in.

Q. Hadn't Mr. Simmons instructed the family not to enter it because of the litigation pending there? A. He had --

THE COURT: Now I think this is a little far afield, Mr. Malloy. I think we have to make a little more progress.

BY MR. MALLOY:

Q. Now, do you remember being asked a question, the following question on a deposition, with reference to this will, and I am reading from page 11, in which you answered [318] this:

A. She wrote a will after Carol had died and she put Raymond in for an equal share at that time. This last will was prepared after she had changed the property and sold it and had the money in the bank instead of invested.

Do you remember saying that at the time? A. Yes.

Q. Now, when you say that she wrote a will after Carol had died, and she put Raymond in for an equal share at that time, you were referring to Raymond Bailey, Walter's son, were you not? A. Yes, she had mentioned that at that time.

THE COURT: Yes or no?

THE WITNESS: Yes. I didn't know that she put it there until she said she had put it in.

THE COURT: Read the question.

THE WITNESS: Yes.

THE COURT: Confine yourself to answering the question.

THE WITNESS: All right.

THE COURT: Never mind reading it. He has answered.

BY MR. MALLOY:

[319] Q. Now when you say she had told you that she put Raymond in for an equal share at that time -- is that right? A. I don't remember when she told me she put him in for an equal share --

THE COURT: Well, now --

THE WITNESS: But she told me she had.

THE COURT: Just a moment. You have asked him whether he said that and he said yes.

MR. MALLOY: Now, I am asking him whether she told him and I am trying to find out when.

THE COURT: I think if you make your questions a little more specific you will get more specific answers.

BY MR. MALLOY:

Q. When did she tell you that? A. I don't know datewise.

Q. It was -- was it around 1952? A. It would just be a guess. It was several years ago.

Q. Now, when she said she put him in for an equal share, was that an equal share with what, with whom? A. I don't know who she had reference to.

Q. And when you said this last will was prepared after she had changed the property and sold it, you are referring to the paper writing dated July the 1st, 1965? [320] A. That's right, because it was --

THE COURT: Just answer yes or no.

THE WITNESS: Okay. Yes.

BY MR. MALLOY:

Q. So that the only two papers that you knew about then was the one which was written when she went into Providence Hospital in 1952 and which she later asked you to return and you did return to her --

A. Yes.

Q. And this paper writing dated July 1st, 1965? A. That's right.

Q. And when you turned this paper over to Mr. Simmons after Mrs. Lester had died, you told him that you knew of no other paper other than the paper writing dated July the 1st, 1965? A. That is the only one I knew about, yes.

Q. And he in turn filed it with the court here as the only paper.

A. I suppose so.

Q. Now with reference to the title to this trailer, had Mrs. Lester ever said anything about leaving the trailer to you in her will? A. No.

Q. She hadn't said anything like that? [321] A. No.

Q. Where was the trailer kept? A. Up until 1955 it was kept here in the District and she had no good place to keep it, so when I moved to Virginia -- and I would like to borrow it quite often too -- she sug-

gested that I might as well have it out there in Virginia and I could bring it in when she wanted to use it.

So I offered to buy it from her and she sold it to me.

Q. What did you pay her for it -- for your work that you had done for her? A. No, I paid her for it. She asked me \$50 for it.

Q. \$50? A. Yes.

Q. And you gave her \$50? A. Yes, sir.

Q. And she didn't at that time say that that is for the work that you are doing? A. (Shakes head negatively.)

Q. Then it was with the understanding that when she wanted to use it -- A. She could always have it.

Q. She would call you up for it and have you -- [322] A. It had --

Q. -- get it. A. It had Virginia tags on it from that time on.

Q. And was that in connection -- did you use it in connection with the delivery of these items that you mentioned for Mr. Adams? A. Oh, no, those were just small print items.

Q. You didn't use -- A. I never --

Q. -- it for that? A. I never did, no.

Q. Now you said that you had a discount card for Sears Roebuck and that you took and had Mrs. Lester use that. Was that a discount card given to employees for their own use and the family use? A. Yes.

Q. Well -- A. She would go with me and I would --

THE COURT: You have answered the question. Yes, is the answer.

THE WITNESS: Yes.

BY MR. MALLOY:

Q. Is there any restriction as to confining it to members [323] of the family? A. No, you can't transfer it, but you can make purchases. There is no questions made --

Q. For anybody? A. Yes.

Q. Now you said that she cussed out Mr. Haynes when he came by. A. She told me she had.

Q. Did she tell you that he came by at the request of her brother Walter? A. She told me that Walter was going to send him down so I took it to mean that.

Q. And she didn't object to Walter sending him down? A. No.

Q. Then she cussed him out when he did come down?

Now, you said that she had needed glasses for several years.

Did she have a magnifying glass? A. Yes, she had half a dozen magnifying glasses she had around the house.

Q. You said that you would call -- whatever there was business calls you would dial the phone for her, is that right? A. [324] Yes. She called Mr. Simmons quite frequently and I think that I called his secretary and made the arrangements most of the time.

Q. She was quite upset about the litigation, was she not? A. Oh, yes.

Q. Now, with reference to when Mrs. Lester went to the hospital on August the 31st, 1965, you were not here at that time, were you? A. I was here.

Q. Did not the police have to break into the -- A. They were there when I arrived. They had not yet taken her to the hospital.

Q. But hadn't they gained entrance by breaking a rear door? A. They had broken the rear door, yes.

Q. They were already in the house then? A. Yes.

Q. Did you have a key to the premises, 436 New Jersey Avenue? A. No, they called me to see if I had a key before they broke in.

Q. And you told them you did not have a key? [325] A. I did not have a key.

Q. Then they broke in? A. Yes.

Q. Now, at the hospital --

THE COURT: When you say "they," whom do you mean by "they"?

THE WITNESS: Mr. Galante, the next door neighbor, called me. They had asked if he had a phone number, and we had left it with him.

THE COURT: No, who broke in?

THE WITNESS: The police.

THE COURT: Oh.

BY MR. MALLOY:

Q. And Mr. Galante had called you to ask if you had the key --

A. That's right.

Q. And then the police gained entrance by breaking the rear door?

A. (Nods affirmatively.)

Q. Now following the break-in, did you accompany her to the hospital or did you remain at the house? A. We went to the hospital.

Q. Well -- A. I did not accompany her, but we drove to the hospital [326] there.

Q. Now, then, what, if anything, was done with reference to locking the rear door or any of the other doors at that time? A. Well, we temporarily nailed up the rear door.

Q. Was that done after you returned from the hospital? A. Before I left the house.

Q. Before you left the house? A. Yes.

Q. Now, then, did you lock the door then? A. Yes.

Q. Then how did you gain entrance to the door again after you came back? A. We took the keys that were in the door at the time, her keys.

Q. Oh. You took the keys? A. Yes.

Q. At that time? A. Yes.

Q. And took them over to the hospital with you? A. Yes.

Q. And then you returned and looked through the house for certain papers? [327] A. Not that day.

Q. What day with reference -- that was August the 31st, is that right? A. Yes.

Q. And then she died on September the 1st, 1965. A. (Nods affirmatively.)

Q. Had you entered the house early in the morning prior to her death? A. No.

Q. You did not enter the house again then until after she died? A. No, because I hadn't turned anything over to Mr. Simmons at that time.

Q. What is that? A. I am wrong there on my times. No, I had not. I am right.

Q. Now, did you then discuss with Walter Bailey that you couldn't find certain papers and requested him and the other members of the family to accompany you to the house? A. I met them at the house the day after she died.

Q. Well, but had you --

THE COURT: When you say "them," whom did you meet at the house?

[328] THE WITNESS: Mr. Bailey, Lillian Bailey, Mrs. Elsie Pinney, Raymond Bailey, young Walter Bailey, Jr., and I think that was all.

BY MR. MALLOY:

Q. They were waiting at the house for you? A. Yes.

Q. They did not have a key to the premises, did they? A. They did not.

Q. Now you then met them at the house and you opened the door then with the key which you had taken when you went to the hospital?

A. Yes.

Q. And you then looked through the house? A. Yes.

Q. Now, during the search, did you see a pocketbook with some money and which you took and says, "This is moving money?" A. Well, in her drawer there was a pocketbook that had -- I think it was \$22 in it. There was also \$50 with a paper clip and a note, with Walter -- with Raymond's name on it and she had told me that that was moving money that she wanted to pay to him, and so we gave it to him at that time.

We should have turned it over to the administrator, [329] but we didn't.

Q. What did you do with the other money? A. They asked me if there was any bills that I knew that she had outstanding and I told them

that she had not paid the rent to the garage for that month. It had been due on the first and it was \$15.

So I took the \$15, I got the rent receipt and I turned the balance of the money and the rent receipt over to Mr. Simmons.

Q. In the -- you turned that over to Mr. Simmons then? A. Yes.

Q. Now with reference to it, you then told them to see if they could find any papers, did you not? You had to go to work? A. Yes. When I turned the papers over to Mr. Simmons there was a list and I asked him what else he might need and he wanted her group hospitalization policy and the title to the car.

And I didn't know where they were and we looked -- well, I was there an hour and we looked for those papers and when I left they were still there looking for those papers.

Q. Now, did there come a time then the next day or so when you changed the lock to the place? [320] A. Yes. Mr. Simmons and I talked about it. I had to get back in there to repair the door and he wanted me to take care --

THE COURT: The question is, did you have the lock changed?

THE WITNESS: I changed it, yes.

BY MR. MALLOY:

Q. And the reason for that was that there was other keys there and Mr. Walter Bailey had one of those keys which would open it in the event he wanted to gain entrance later? A. We found out that the lady across the street had a key also and I didn't know who else might have had one, and if I was authorized by the administrator to go in to make repairs and to see about the things, I didn't want -- I would be responsible, I felt, so I would rather had had that lock changed and we just had the one key so we knew who was going in --

Q. When you said the lady across the street had a key, to whom do you refer? A. Mrs. Burkette.

Q. Now, as a matter of fact, hadn't Mrs. Burkette -- isn't she the one who originally called the police? A. Yes.

[331] Q. And that heard the dog barking? A. Yes.

Q. Well, she couldn't have had a key or she certainly wouldn't have been calling you --

THE COURT: No, no, no. Just a moment. Do not argue with the witness, Mr. Malloy.

BY MR. MALLOY:

Q. But in any event you did change the lock? A. We changed the lock.

Q. Now, with reference to the services which you performed for Mrs. Lester, you state in your pretrial statement, which is in the report, for the period of approximately 25 years prior to her death, you were her main source of assistance in matters concerning transportation, repairs, grocery shopping, household chores, errands, business affairs, and numerous other tasks. She was fond of him and he was fond of her. His assistance to her --

THE COURT: What are you reading from, Mr. Malloy?

MR. MALLOY: From the pretrial examination or the pretrial report.

THE COURT: You mean the pretrial order?

MR. MALLOY: Yes, Your Honor.

THE COURT: Well, I don't think you should do this, that a witness may be confronted with a pretrial --

[332] MR. MALLOY: Well, I am --

THE COURT: -- statement made by counsel.

MR. MALLOY: I am asking if he did these.

THE COURT: Well, then, you may ask him that, but --

MR. MALLOY: I wanted to read it so he would know.

BY MR. MALLOY:

Q. You know about that then. Have you rendered these things that you have said here? A. Oh, yes.

Q. And your assistance to her was out of friendship and not for compensation? A. Yes.

Q. And over the years she became less friendly with her brothers and sisters. A. Maybe not less friendly. She had less contact with them.

Q. You said that she justifiably believed that her brothers and sisters were not sympathetic --

THE COURT: Now, just a moment. You may not read this, Mr. Malloy.

BY MR. MALLOY:

Q. Did you say that her brothers and sisters were not sympathetic with her problem? [333] A. What problem?

Q. With her problems, all these problems that she had about worrying about --

THE COURT: There is no evidence that he said anything like that, Mr. Malloy.

MR. MALLOY: I am asking him --

THE COURT: Just a moment. A pretrial statement is a statement prepared by counsel.

You have a right to confront the witness with his own prior statements.

MR. MALLOY: But he did say it in answer to Mr. Poston's questions, that he did all these things.

THE COURT: Yes. I am referring to this last question. I haven't heard him say on direct examination anything of that sort.

BY MR. MALLOY:

Q. Did you say that they didn't pay as much attention to her as they should have? A. I don't remember saying it, no.

Q. Did you -- do you remember when Elsie was nursing her sister on one occasion and when this -- an incident of the roach matter -- when you were taking Elsie to the bus stop, that she complained or discussed with you about Emma and her [334] condition? She was concerned about her and the way Emma was talking. And you said that whenever she fussed or had any --

THE COURT: No. Just a moment. You are practically testifying, Mr. Malloy. I am going to exclude that.

MR. MALLOY: Well, Elsie had testified to a conversation which she had with him.

THE COURT: Just a moment. He did not say anything like that on direct examination.

MR. MALLOY: I think -- I am asking him now if he says that to Elsie at the bus stop.

THE COURT: You have a right to say did you say so and so.

BY MR. MALLOY:

Q. Did you say to Elsie at the bus stop that whenever Mrs. Lester fussed with you that you stayed away for a few days? A. I have already testified to that before about when she had spat with my wife, that we just stayed away and waited until she called us.

Q. In other words you -- A. I never pushed myself back. When she called we would go over.

[335] Q. Now, you knew and you had the arrangement with her that she could use the trailer which you had procured from her, and that was your understanding and agreement at the time it was transferred to you, was it not?

THE COURT: I am going to exclude that because you have asked him about it and he answered the same question. Do not have repetition, Mr. Malloy.

We have to make more expeditious progress.

MR. MALLOY: Well, if Your Honor please --

THE COURT: This is repetitious. That is the only reason I am excluding it. It is relevant but you have already asked about that and he answered the question.

MR. MALLOY: Well, I think if Your Honor -- I will ask it this way.

BY MR. MALLOY:

Q. You had the trailer at that time, did you not? A. What time?

Q. When you had the discussion and when you were staying away from her? A. No.

Q. You didn't? It was later? A. That was within -- that was in the first few years that we knew her. That was, I imagine, in the 40s, sometime.

[336] Q. Now, she didn't have -- didn't it occur when you had the will in '52? A. Oh, no. It was long before the will was ever thought of.

Q. Well, but the will, you stated that the will was drawn -- the only two wills you know about, one was --

THE COURT: No, don't argue with him. Just ask questions.

BY MR. MALLOY:

Q. Did you not state that she prepared a will in 1952 when she was going to Providence Hospital?

THE COURT: No. He said so. Do not repeat.

BY MR. MALLOY:

Q. Well, was that in 1952?

THE COURT: He said in 1952. Now let's go on to something else.

MR. MALLOY: Well, the thing is that he has now said that the trailer was in 1955 and I asked him about the will and --

THE WITNESS: No, you have --

THE COURT: He said right along that he bought the trailer in 1955, that the prior will was executed in 1952. There is no connection between the trailer and --

[337] THE WITNESS: The prior --

THE COURT: Just a moment. There is no connection between the trailer and the prior will according to his testimony.

MR. MALLOY: No, but now he has stated that whenever he -- whenever she fussed with him, he stayed away from the --

THE COURT: He said that. Now let's move on to something else. I think you have exhausted the subject of the trailer.

BY MR. MALLOY:

Q. Now, you said that Elsie made cookies for her at Christmas

time. Did she not at other times, many times during the year, bring her cookies? A. No.

Q. Just at Christmas time? A. Christmas time.

Q. Did Mrs. Walter Bailey bring cake or half .. cake to Mrs. Lester many times? A. I wasn't there when she came over.

Q. When Elsie came down to nurse her, did she not bring cookies to --

THE COURT: Oh, let's forget the cookies, Mr. Malloy.

MR. MALLOY: You may examine now.

REDIRECT EXAMINATION

[338] BY MR. POSTON:

Q. Mr. Fisher, with regard to the will of 1952, were you actually left anything under this will? A. I was left the bay property at that time.

Q. What were the relations -- what was the relationship between Mrs. Lester and her father during the time that you knew Mrs. Lester?

THE COURT: Now, how is that proper redirect examination?

I am going to confine the redirect examination to proper redirect because there is no use opening up new matters on redirect examination.

MR. POSTON: I withdraw the question, Your Honor.

THE COURT: I am going to say the same thing to you that I did to Mr. Malloy.

We have to make more expeditious progress.

MR. POSTON: Just a couple of questions, Your Honor.

BY MR. POSTON:

Q. Why didn't you tell anyone about the will of July 1, 1965? A. Well, it wasn't ethical as long as she lived to tell. She didn't want anyone to know about it. I didn't even tell my wife about it.

[339] Q. What would she have done if you had told someone?

THE COURT: I am going to strike that.

MR. POSTON: All right.

THE WITNESS: I was afraid to find out.

THE COURT: Did you know what was in the will of July 1, 1965 at the time it was executed?

THE WITNESS: I knew approximately, yes.

THE COURT: Beg your pardon.

THE WITNESS: I knew, yes.

THE COURT: Yes.

BY MR. POSTON:

Q. What were your feelings toward Mrs. Lester, Mr. Fisher?

A. Well, I had the highest --

THE COURT: No, that is not redirect examination. You have been over that.

Sometimes one unnecessary question on redirect opens up a whole line of recross-examination.

MR. POSTON: No further questions.

#### RECROSS-EXAMINATION

BY MR. MALLOY:

Q. Now, in answer to Mr. Poston's questions now, when he asked you why you did not say anything about the will, you [340] stated that Mrs. Lester told you not to say anything to anybody. A. That's right.

Q. Is that right? A. That's right.

Q. Did you not say on direct examination that the reason was that you were afraid the family would destroy the will? A. No. When I remonstrated about taking it, she said if something happened to her and the family found it, it would be torn up.

MR. MALLOY: That is all.

THE COURT: You may step down.

THE WITNESS: Thank you.

(The witness left the stand.)

MR. POSTON: Mr. Pullman, please.

Whereupon

## ALBERT W. PULLMAN

was called as a witness by the Caveatee, and having been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. Albert W. Pullman.

[341] THE COURT: What is your last name?

THE WITNESS: Pullman.

THE COURT: Pullman?

THE WITNESS: P-u-l-l-m-a-n.

4002 Bladensburg Road, Cottage City, Maryland.

BY MR. POSTON:

Q. What do you do for a living, Mr. Pullman? A. I am a painter.

Q. Did there come a time when you became acquainted with Emma O. Lester? A. Yes, sir.

Q. When did you first become acquainted with her? A. Sometime in the later part of the 30's, probably about '39 or maybe 1940.

Q. How did you become acquainted with her? A. Well, I had a cottage at Deale Beach, Maryland, and when she built down on the point, that is when I became acquainted with her.

Q. From there on did you have occasion to see her very often? A. Quite often, during the summer when I was down at the beach.

Q. And approximately how often would you see her during the summer? [343] A. Oh, probably every two or three weeks.

Q. Did you see her during the summer of 1965? A. Yes, sir.

Q. Approximately how often did you see her during that summer?

A. Well, we saw her quite often at that time because she had the two houses down there and one was vacant and she had a lot of trouble when she was fixing up the house, etc., etc.

She came up into my yard and came to my cottage and she talked with my wife and myself.

Q. How close was her cottage to your cottage? A. Well, the one on the point must be about 400 feet and the other one up the road is about 200 feet.

Q. I see.

Would you have occasion to see her working about her property during that summer? A. Yes, sir.

Q. What would you see her doing? A. She would be out in the yard raking leaves or pulling weeds or cleaning up the place. She was practically down there -- this last summer of '65 she was down there quite often.

[343] Q. Now during this time did you have conversations with her? A. Yes, sir.

Q. Did you notice anything unusual about her conversation during that summer? A. No, sir.

Q. Was she clear in her conversation? A. Yes.

Q. Did she appear mentally alert to you? A. She was mentally alert.

Q. Now, based upon your acquaintanceship with her and your association with her and your observations of her, do you have an opinion as to whether or not she was of sound and disposing mind and able to make a valid deed or contract during the period you observed her in the summer of 1965? A. Mrs. Lester had a sound mind. She was capable of telling you anything she wanted to, and it all made sense. There wasn't anything wrong with Mrs. Lester.

MR. POSTON: No further questions.

#### CROSS EXAMINATION

##### BY MR. MALLOY:

Q. The bay front property was closed for the last couple of years, was it not? [344] A. The road.

Q. But the road was closed off so that you could not gain entrance to the -- A. That is correct.

Q. Isn't that right? A. That's right.

Q. Are you sure that you saw her working in 1965? Wasn't it closed off so that you couldn't get into the property? A. She had the other cottage right up the street on Main Street, about 200 feet from me. I have a cottage on Main Street.

Q. And it was at the cottage on Main Street then that you saw her? A. I saw her there, yes, sir.

Q. When did you last see her? A. About a week before she died on a Saturday.

Q. Did you know that at that time she had been suffering from heart disease or -- A. No, sir.

Q. You didn't know she had any ailments -- A. No ailments at all that I ever knew of.

MR. MALLOY: That is all.

[345] MR. POSTON: Nothing further.

THE COURT: You may step down.

(The witness left the stand.)

MR. POSTON: Mrs. Mary Baker.

Whereupon

MARY S. BAKER

was called as a witness by the Caveatee, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. I am Mary S. Baker, 1043 N. Daniel Street, Arlington, Virginia.

Q. Where are you employed, Mrs. Baker? A. I am retired.

Q. Where did you work when you were working? A. United States District Court, Domestic Relations.

Q. When did you retire? A. August, 1955.

Q. Did there come a time when you became acquainted with Mrs. Emma O. Lester? A. Yes, there did.

Q. When was this? [346] A. Well, I was married in 1927 and she was a friend of my mother's and the family at that time and I have a wedding gift that she gave me at that time.

Q. Did you keep in touch with her over the years, from 1927 on? A. Yes, we did.

Q. Did you have occasion to see her in the year 1965? A. Yes, it was just last year. We had been to Cedar Hill Cemetery, my sister and I, and we found some flowers on my mother's grave and we thought perhaps Mrs. Lester put them there. We stopped by her house on New Jersey Avenue --

THE COURT: Suppose you confine yourself to answering questions. Ask the next question.

BY MR. POSTON:

Q. When was it when you saw her on that occasion? A. It was April of 1965.

Q. And you saw her at her home? A. Yes, on New Jersey Avenue.

Q. And did you have a conversation with her at that time? A. Yes. She came to the door and said, "Come on in, Esther and Mary."

[347] THE COURT: Would you mind speaking a little louder. Some of the jurors are quite a distance away from where you are seated and they all have to hear your testimony.

BY MR. POSTON:

Q. Did she recognize you? A. Yes. She said "Come in, Esther and Mary."

Q. What did you observe about her mental condition at that time? A. Well, I thought she was very capable of carrying on a conversation because she reminisced some things way back about my mother and my father.

Q. Did she ramble in her conversation? A. No, none whatsoever.

Q. Was she completely coherent in her conversation? A. Yes, indeed.

Q. Did you notice anything about her ability to see? A. No, I didn't notice anything, any difficulty. I know she didn't wear any glasses.

Q. Now, in your opinion, based on your observations at that time, was she of sound and disposing mind and able to make a valid deed or contract? A. Yes, indeed, in my estimation.

Q. Now, did you see her after that particular visit [348] while she was living? A. No, that was the last.

MR. POSTON: No further questions.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. When had you seen her before this April visit, Mrs. Baker?

A. Well, at various times. She would come --

Q. When was the last time before the visit in April? A. That was April of '65. Why it was the year previous to that, '64 and on back.

Q. Well, when had you last seen her? You saw her in April, 1965?

A. Yes.

Q. When was the last time you had seen her prior to that time?

A. I had seen her in January of '65.

Q. January of '65? Where did you see her then? A. At her home.

Q. At her home. Did you notice the condition of the home when you were in there? A. What do you mean, what condition?

[349] Q. It was rather cluttered up, was it not, with odds and ends and furniture and what not? A. Well, I wouldn't say it was cluttered up.

Q. You wouldn't? A. No.

Q. Did you notice a dog around there? A. Yes. She had a dog that came to the door with her, like a lot of people do.

Q. And you say you have been at the cemetery at that time? A. Yes.

MR. MALLOY: That is all.

THE COURT: You may step down.

(The witness left the stand.)

We will recess at this time for our usual luncheon recess.

(Whereupon at 12:25 p.m. the Court recessed for luncheon until 1:45 p.m.)

[350] AFTERNOON SESSION (1:45 p.m.)

THE COURT: You may bring in the jury.

(The jury entered the courtroom.)

You may call your next witness, Mr. Poston.

MR. POSTON: I call Doctor Summerfield.

Whereupon

LAWRENCE D. SUMMERFIELD

was called as a witness by the Caveatee, and having been duly sworn, was examined and testified as follows:

## **DIRECT EXAMINATION**

BY MR. POSTON:

Q. Please state your name and address, sir. A. Doctor Lawrence D. Summerfield.

THE COURT: Now, Doctor, you are in a big courtroom and some of the jurors are quite a distance away from where you are seated, so you will have to speak loudly, slowly and distinctly.

If you wish, you may use the microphone. May I have your name again, Doctor?

THE WITNESS: Lawrence D. Summerfield, 3230 Pennsylvania Avenue, Southeast.

THE COURT: How do you spell your last name?

[351] THE WITNESS: S-u-m-m-e-r-f-i-e-l-d.

THE COURT: Thank you.

BY MR. POSTON:

Q. What is your profession? A. I am a private physician.

Q. Do you have a specialty? A. General practitioner.

Q. Are you licensed to practice medicine in the District of Columbia? A. Yes, I am.

Q. From what medical school did you --

THE COURT: Will the Doctor's qualifications as a general practitioner be admitted?

MR. MALLOY: Yes, we will consent that he is a qualified general practitioner.

THE COURT: That will save time.

BY MR. POSTON:

Q. Did there come a time when you treated Emma O. Lester professionally? A. Yes.

Q. When was the last time that you saw her professionally?

MR. MALLOY: I object, if Your Honor please, that the Doctor is precluded and is not competent to testify as to [352] his treatment of this --

THE COURT: This is just a preliminary question. I think your objection is a bit premature. When we get to the crux of the testimony.

--

MR. MALLOY: He asked him about what treatment.

THE COURT: Well, that doesn't give any confidential information; the fact that he treated her is admissible.

I overrule the objection but you may renew it after the preliminary questions are asked.

BY MR. POSTON:

Q. When was the last time that you treated her, Doctor Summerfield? A. The last time I saw her for treatment was August 31, 1965, at Casualty Hospital.

Q. When was the time you saw her prior to that, the last time

prior to that time? A. Well, the time just prior was -- my record -- June the 7th, 1965.

Q. And on that occasion did she visit your office? A. Yes, she did.

Q. Did you have a conversation with her at that time? A. I did.

Q. Did you ask her on that occasion various questions?

[353] MR. MALLOY: I object again, if Your Honor please, that the Doctor --

THE COURT: Now, gentlemen, I suggest that counsel come to the Bench.

(Whereupon counsel approached the Bench and the following proceedings were held:)

THE COURT: I think your objection is well founded, Mr. Malloy, insofar as it is directed to any diagnosis of the patient's condition and the treatment that the Doctor gave her.

However, other matters that any layman could testify about do not disqualify the doctor.

MR. MALLOY: The thing is that the Doctor procured this information on the basis of statements made to her while being treated as a physician, and the only one who could waive the privilege, of course, is either the patient --

THE COURT: Is what?

MR. MALLOY: The only person who could waive the privilege, in other words, that what the Doctor found out, he found out from the patient --

THE COURT: Who did you say could waive the privilege?

MR. MALLOY: Either the lady herself --

THE COURT: She is dead.

[354] MR. MALLOY: Or her legal representative and she doesn't have a legal representative.

THE COURT: She doesn't. There is no question about that.

MR. MALLOY: And --

THE COURT: Now, just a moment. You have a right to assert the privilege. There is no question about that.

The question is how far does the privilege extend.

MR. MALLOY: I have here cases, Your Honor --

MR. POSTON: I am not going into privilege.

MR. MALLOY: Title 14-694 on page 2011, I think, in the '61 Edition of the Code, and it says that the testimony of --

THE COURT: What section number?

MR. MALLOY: Section 14308.

MR. POSTON: I might point out I am not going to go into privileged material. I am going to examine him as a layman.

MR. MALLOY: But you can't. The only way he found out the information --

THE COURT: No physician or surgeon shall be permitted without the consent of the person afflicted or his legal representative to disclose any information confidential in its [355] nature which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity.

Well --

MR. MALLOY: In the footnotes there --

THE COURT: He may have had a conversation about her property, for all we know. That would be admissible.

MR. MALLOY: Well, not if he got it in here, in the basis, while he is attending her.

In other words, everything that she told him as a physician --

THE COURT: No, no, I won't rule that way.

MR. MALLOY: Then, Your Honor, here is the case --

THE COURT: Beg your pardon.

MR. MALLOY: I say I have cases here.

THE COURT: Give me one case on all fours.

MR. MALLOY: Stafford versus American Security and Trust Company, 55 Fed. 2d.

THE COURT: Now, is that your best case?

MR. MALLOY: Well --

THE COURT: Give me your best case. I want your one best case that is on all fours, because if you have one case that is on all fours, that supports you, that is all you need.

[356] MR. MALLOY: Well, you have it right here in those.

THE COURT: No, you have to pick it out.

MR. MALLOY: All right. Then I would say the Stafford case held that the testimony of a physician attending testatrix was inadmissible.

THE COURT: In what circuit was that?

MR. MALLOY: This here, in the Court of Appeals.

THE COURT: 55 Fed. 2d?

MR. MALLOY: Yes.

THE COURT: What page?

MR. MALLOY: It is cited in -- Mersch cites a dozen cases.

THE COURT: I don't care about that.

MR. MALLOY: 60 Appeals, D.C., 380.

THE COURT: 60 Appeals, D.C. Would you get that, please?

MR. MALLOY: It says that the testimony of an attending physician is inadmissible and confidential relationship is presumed.

In other words, that since he is a doctor, the confidential relationship is presumed and that any tender of proof, if they had anything that they wanted to say they were going to show, that they should show it.

[357] THE COURT: I will look at your case.

MR. POSTON: I know one --

THE COURT: Do you wish to say anything?

MR. POSTON: Once -- I know one that was pointed out in Mersch where the court held the doctor could testify on unprivileged matters.

THE COURT: Do you have the case?

MR. POSTON: No, I don't have it.

THE COURT: Do you have a case?

MR. MALLOY: Here is another.

THE COURT: I am of the opinion that this section is limited only to confidential information because --

MR. MALLOY: Well, but --

THE COURT: Just a moment. Because the statute says so. Also it must have been acquired in attending a patient in a professional capacity. In other words, there are two requirements: first, it must have been acquired while attending the patient in a professional capacity, but that is not all.

MR. MALLOY: Well --

THE COURT: Just a moment. Are you listening?

MR. MALLOY: Yes, Your Honor. Yes.

THE COURT: There are two requirements in order to [358] exclude the evidence.

One is that it must have been acquired while the doctor was acting in a professional capacity.

The second is that the information itself must be confidential in its nature.

In other words, not everything that is acquired by a doctor while acting in a professional capacity is within the privilege. It has to be confidential information.

Now, let me look at your case.

(Examined.)

Well, that case, I think, supports my view.

MR. MALLOY: Well --

THE COURT: It states that the Code renders a physician an incompetent witness to testify concerning confidential information acquired while attending a patient in his professional capacity.

MR. MALLOY: I have here --

THE COURT: Just a moment. The Court is speaking.

Gentlemen, I don't argue with counsel. I listen to counsel's arguments and then I rule. That finishes matters.

If my ruling is wrong there is a way of reviewing it. I am referring to Stafford against American Security and Trust Company, 60 Appeals, D.C. 380.

[359] Now, I am going to ask the reporter, if she will, to go back to the question and read the question back to me.

(Whereupon the following was read by the reporter:)

"Q. Did you ask her on that occasion various questions?"

THE COURT: Of course I will allow that. Now, I am going to follow the practice suggested by Justice Robb in the Stafford case, for whom we all have a very high regard, or had a high regard.

In accordance with his suggestion I am going to ask you to make a proffer of proof, Mr. Poston.

What do you expect to elicit from this witness?

MR. POSTON: I am not going to ask --

THE COURT: No. What do you expect to elicit from the witness?

MR. POSTON: The fact that she was rational in her conversation. She did not ramble. She appeared mentally alert. And based on this, and without going into privileged communications --

THE COURT: Well --

MR. POSTON: -- I am going to ask his opinion.

THE COURT: Let's proceed. The question that you asked, of course, is clearly admissible.

[360] MR. MALLOY: May I say this, if Your Honor please. Further in connection with this, there are two cases later, one is Taylor versus United States, in 1955, which is reported in 95 U.S. Appeals, D.C., 373, 222 Fed. 2nd, 398, in which the --

THE COURT: I asked you for your best case, Mr. Malloy.

MR. MALLOY: I know, but that is my fault with that, and the only thing that I --

THE COURT: It is too late now. I have ruled. You want me to change my ruling?

MR. MALLOY: I want you to hear all the cases that I have on the

--

THE COURT: I will hear your argument, but then you must make your argument and finish and then you must keep still after that.

MR. MALLOY: Then there is another case of Sher, S-h-e-r, versus Dehaven, at 91 U.S. Appeals, D.C., 257. Certiorari denied in 73 Supreme Court 797, 345 U.S. 936, 97 Law Edition 13 --

THE COURT: No, do not give me the Law Edition.

MR. MALLOY: Now, in which the court said the privilege against physician's disclosure of confidential [361] information acquired in attending patient without patient's consent extends not only to information orally given physician by the patient, but also to any information obtained by the physician in his professional capacity.

THE COURT: We know all that.

MR. MALLOY: Through his observation or examination and diagnosis and treatment of patient as well as all inferences and conclusions therefrom. Now that is in the DeHaven case.

Then in the Taylor versus United States case, it says that this section, which is section 14-308, governing disclosure by physicians or surgeons of confidential information which he may have acquired in attending a patient in professional capacity is very broad and forbids disclosure of physician of any information obtained by him in professional capacity.

I submit that all of the information that he will acquire is obtained or has been obtained in his professional capacity and, therefore, he wouldn't be disclosing.

Now, if Mr. Simmons had been appointed, why he could have waived the privilege or the patient herself, but in view of that, I submit that since there isn't anybody to waive it that it can't be.

[362] THE COURT: Have you concluded?

MR. MALLOY: Yes, Your Honor.

THE COURT: The way I view the physician's privilege, as the unambiguous phraseology of the statute bears out, is that a physician

or surgeon may not testify to information provided it meets these two tests, not either one of the tests, but both tests: first, that he must have acquired it in his professional capacity.

But that is not enough. Second, it must be confidential information.

Therefore, diagnosis, the course of treatment, etc., will be excluded.

If, for instance, the witness in this case examined this patient and made a certain diagnosis or came to the conclusion there was nothing wrong with her on examination, that would be excluded.

Also, what he did for her would be excluded.

But information that is not confidential, even though elicited in the course of professional visits, or professional relationships, is not barred by the privilege.

I may add this. Physician's privilege frequently works a gross injustice. The real purpose of the privilege is to protect a patient from having his personal condition disclosed [363] to the public -- for example, the fact that he is suffering from certain ailments, which he would rather not have people know about, etc.

Here, however, we have a person who is deceased. Second, we have a physician who apparently will, instead of disclosing that there was something wrong with the patient, apparently is expected to testify that the patient was in good health.

Certainly the public policy back of the privilege shouldn't apply to such a situation.

However, it does apply and I shall enforce the privilege, but I shall not broaden it.

The modern tendency, you know, has been to narrow down the privilege.

I think this is particularly important in this case. I realize the Caveators called a psychiatrist who, on the basis of a hypothetical question, testified that the deceased was incompetent.

Now, to be sure, there are cases in the Court of Appeals which hold that introducing one physician doesn't waive the party's rights to insist on the privilege as to other physicians.

However, the result is an unjust one.

[364] I am not basing my ruling, however, on any such thing as that. I am basing my ruling on what I understand to be the boundaries of the privilege, namely, that the information not only must have been acquired in a professional capacity, but it must also be confidential in its nature.

You may ask the next question.

MR. MALLOY: Will you allow us an exception?

THE COURT: However, there may be some questions that are on the border-line and you may note an objection to those questions and I shall make a separate ruling as to each question, whether it falls within or without the privilege.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

THE COURT: Suppose you repeat your question.

BY MR. POSTON:

Q. Doctor Summerfield, when Mrs. Lester came to your office in June of 1965, did you ask her various questions about her condition?

A. Yes, I did.

Q. Was she responsive to your questions in a sensible manner?

A. She explained her symptoms to me very well.

THE COURT: Now, Doctor, some of the jurors may have [365] difficulty in hearing you.

THE WITNESS: I assume this is a microphone here.

THE COURT: You have to speak slowly, loudly and distinctly. Suppose you were addressing an audience. This is not in an office. Now, what was your answer?

THE WITNESS: Yes.

BY MR. POSTON:

Q. Did she ramble in her conversation? A. No, she did not.

Q. Was she coherent? A. She was completely coherent.

Q. Now, Doctor, based -- basing your opinion only on what you observed in these conversations and not basing it on any privileged communication with her, do you have an opinion as to whether she was of sound or unsound mind at that time?

MR. MALLOY: Now, if Your Honor please, I object because there is a case and there is a case in the Court of Appeals which rules that it is the opinion of the judge and not the opinion of the doctor as to what is a confidential communication.

[366] THE COURT: You are quite right. The Court agrees with you.

MR. MALLOY: I object to this --

THE COURT: Are you objecting to the question?

MR. MALLOY: Yes, sir.

THE COURT: I am inclined to sustain the objection to the question because it would be difficult for a doctor, in framing an answer to the question, to separate the confidential and non-confidential aspects of the information that he received.

I sustain the objection to that question.

BY MR. POSTON:

Q. Now, basing your --

THE COURT: I want to repeat what I ruled and what I said at the Bench conference so that the jury may understand.

Confidential information obtained by a physician in the course of treating a patient in his professional capacity is privileged. In other words, the information must be obtained in a professional capacity and second, it must be confidential.

I think this may call upon him to frame an opinion which is in part based on confidential information.

I sustain the objection.

[367] BY MR. POSTON:

Q. Doctor Summerfield, basing your opinion on her manner of answering your questions, the manner that she spoke, the coherence of her conversations, basing it just on this, do you have an opinion as to whether she was of sound or unsound mind at that time?

MR. MALLOY: I again object, if Your Honor please.

THE COURT: First let him answer yes or no. Do you have an opinion?

THE WITNESS: Yes, I have.

THE COURT: Now, what is your next question?

MR. POSTON: What is your opinion?

MR. MALLOY: I object.

THE COURT: I sustain the objection for the reason already stated.

MR. POSTON: I will try again, Your Honor.

BY MR. POSTON:

Q. Now, based on your acquaintance and association with Mrs. Lester, without bringing into your opinion anything of a medical nature, do you have an opinion as to whether or not she was of sound and disposing mind and able to make a valid deed or contract at that time?

MR. MALLOY: I --

THE COURT: Just answer yes or no. First, do you [368] have an opinion?

THE WITNESS: Yes, I have an opinion.

BY MR. POSTON:

Q. What is your opinion, Doctor Summerfield?

MR. MALLOY: I object, if Your Honor please.

THE COURT: I am going to sustain the objection.

In the first place, if you are asking for his opinion as a layman, because he is not an expert in mental diseases, a layman may give an opinion only after he testifies to the details and facts on which the opinion is based.

MR. MALLOY: That's right.

MR. POSTON: Well, is it the opinion of the Court that there is no way to get an opinion?

THE COURT: Oh, I am not going to cover such a wide area, Mr. Poston.

MR. POSTON: Well, if the Court will indulge me a moment, I will reframe my question once more.

THE COURT: Surely. I think I should not overreach but confine myself to ruling on questions as they are asked by counsel.

MR. POSTON: Excuse me a moment.

I will try once more, Your Honor.

BY MR. POSTON:

[369] Q. Doctor Summerfield, based on the manner of her speech and the manner of her conversation and not the contents of her conversations or communications with you, and viewing her not from the viewpoint of a physician, but from a viewpoint of a layman, do you have an opinion as to whether at that time she was of sound and disposing mind? A. Yes, I have.

Q. What is your opinion, Doctor?

MR. MALLOY: I object again.

THE COURT: Objection sustained.

MR. POSTON: Well, Your Honor, I don't believe there is any way to get that opinion in.

THE COURT: I think you have gotten some facts from him.

MR. POSTON: That is true, Your Honor.

I will give up on that, Your Honor.

THE COURT: Do you want to cross-examine the witness?

MR. MALLOY: I think not, Your Honor.

THE COURT: The doctor may be excused.

THE WITNESS: Thank you.

(Whereupon the witness left the stand.)

MR. POSTON: Thank you, Doctor.

[370] THE COURT: Will counsel come to the Bench?

(Whereupon counsel approached the Bench and the following proceedings were held:)

THE COURT: Members of the bar very frequently in the heat of battle forget that it isn't enough to win a case in the trial court. You have to sustain it on appeal, even if you win.

MR. POSTON: True, Your Honor.

MR. SIMMONS: Right, Your Honor.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

Whereupon

LILLIAN D. BRENNAN

was called as a witness by the Caveatee and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. Mrs. Lillian D. Brennan, 440 --

THE COURT: You will have to speak loudly, slowly and distinctly so that everyone in the courtroom can hear you.

You may use the microphone if you wish.

Would you repeat your name, please?

[371] THE WITNESS: My name is Mrs. Lillian D. Brennan.

THE COURT: No. Get closer to the microphone.

THE WITNESS: Lillian D. Brennan.

THE COURT: B-r-e-n-n-a-n.

THE WITNESS: B-r-e-n-n-a-n.

THE COURT: Your first name?

THE WITNESS: Lillian.

BY MR. POSTON:

Q. And your address, Mrs. Brennan? A. 440 New Jersey Avenue, Southeast.

Q. What is the nature of your employment, if you have any, Mrs. Brennan? A. Real estate saleswoman and housewife.

Q. Did there come a time when you became acquainted with Emma O. Lester? A. Yes.

Q. When was this? A. June 1949.

Q. How did you become acquainted with her? A. I moved into my home at that time.

Q. Was this close to where she was living at that time? A. Second house south of her home.

Q. From then on did you have occasion to see her [372] frequently? A. Oh, yes, almost every day.

Q. Up until when? A. I would say January of '65.

Q. During this time did you have conversations with her? A. Yes, I did.

Q. Many conversations? A. Many.

Q. In her conversations did she ramble? A. No.

Q. Was she mentally alert? A. Yes, very much so.

Q. Was she rational in her conversation? A. Yes, she was.

Q. Was she coherent? A. Yes.

Q. Did you notice any difficulty with regard to her eyesight? A. No.

Q. Did she recognize you when she saw you? A. Yes, even in my doorway.

Q. Did there come a time when, to your knowledge, she was negotiating the sale of her real estate? [373] A. No. I knew about it afterwards, because I was out of town.

Q. Do you sell real estate in that neighborhood? A. Yes, I do.

Q. Do you know the value of real estate in that neighborhood? A. Yes.

Q. Do you know what she got for her property? A. Yes, I do.

Q. How much did she get for it? A. \$35,000 cash.

Q. Was this a fair price for that property?

THE COURT: Well, now, I don't think that has anything to do with this case, Mr. Poston.

MR. POSTON: Well, during the Caveators' testimony, they went into the matter then.

THE COURT: It doesn't appear that this witness is a real estate expert -- an expert on real estate values.

MR. POSTON: Excuse me. I withdraw the question.

BY MR. POSTON:

Q. There has been testimony in this case, Mrs. Brennan, about dog poisoning in the neighborhood.

Do you know anything about that?

[374] THE COURT: No. You have to ask a specific question.

BY MR. POSTON:

Q. Was there any dog poisoning in that area? A. At that time?

Q. Yes, at the time Mrs. Lester was living there. A. My own dog was poisoned.

Q. When was this? A. This was in 1950.

Q. Well, did there come a time when any of Mrs. Lester's animals were poisoned? A. Her cat.

Q. Do you know her neighbor, Miss Buxton? A. I see her. She is a renter.

Q. She is a renter? A. Yes.

Q. Do you know where she lives? A. Yes. 438.

Q. Has there been any difficulty in the neighborhood with her?

A. Just so far as trash is concerned.

Q. Have you ever heard Mrs. Lester say anything about her? A. Yes.

[375] THE COURT: Don't go into that.

MR. POSTON: I withdraw the question, Your Honor.

THE COURT: Quarrels of that kind, petty quarrels of that kind.

MR. POSTON: No further questions. Oh, there is one more question.

THE COURT: Surely.

BY MR. POSTON:

Q. When was the last time you saw Mrs. Lester? A. It would be about the spring of '65 while she was moving.

Q. Well now, in your opinion, based on your observations, was she of sound and disposing mind and able to make a valid deed or contract the last time you saw her? A. Very much so.

MR. POSTON: No further questions.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. The last time you saw her, Mrs. Brennan, was in the spring of '65? A. That's right.

Q. That was before she moved to her new place? A. While she was moving.

[376] Q. Well, then, she hadn't moved. She was in the process of moving when you last saw her? A. Yes.

Q. You didn't see her after she was at 1525 S Street? A. No.

Q. Did you have any discussion with Mrs. Lester about a will?

A. At one time she said something about a will.

Q. What did she say? A. About a year and a half before, she said that her relatives didn't come to visit her so she was going to tear up the will and I said, "Well, that wouldn't be very nice. What about Leo?"

And she said, well, she would take care of Leo.

Q. This was about a year and a half before she -- A. Moved.

Q. And you didn't see her while she was in the S Street house? A. No, I did not.

MR. MALLOY: That is all.

MR. POSTON: No further questions.

THE COURT: You may step down.

(The witness left the stand.)

[377] MR. POSTON: I call Mrs. Tull.

Whereupon

EMMA J. TULL

was called as a witness by the Caveatee, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Please state your name and address. A. Emma J. Tull.

THE COURT: What is your last name?

THE WITNESS: T-u-l-l, Tull.

THE COURT: Tull, yes.

What is your first name?

THE WITNESS: Emma J.

BY MR. POSTON:

Q. What is your address? A. 1923 16th Street, Southeast, Washington, D.C.

Q. Did there come a time when you became acquainted with Emma O. Lester? A. Yes.

Q. When was this? A. Well, I have known Mrs. Lester more than 35 years.

Q. How did you become acquainted with her? [378] A. They lived in my neighborhood. I lived on First Street, Southeast, for 61 years and the Bailey family lived in my neighborhood and I got acquainted with them there.

Q. All right. Now did you have occasion to see Mrs. Lester frequently during the last months of her life? A. Oh, yes. Mrs. Lester -- I sold my house in Southeast, and moved to Anacostia where I am, and Mrs. Lester came over to get a house close to me as possible, which was the S Street home.

Q. Now, how many times would you say you saw her during the summer of 1965? A. Well, I saw her quite often. Either she would come up past my place, we were only within a good square of each

other, and I would either walk down there in the evening to see her or she would come up to see me.

Q. Did there ever come a time when she discussed a will with you? A. Yes. There was will discussed in 1953.

THE COURT: 1963 or '53?

THE WITNESS: No, '53.

BY MR. POSTON:

Q. Was this about the time she was hospitalized? A. Yes.

[379] Q. What was this discussion? A. Well, she was, she brought it to my house and she and Mr. Fisher and my daughter and myself --

THE COURT: Keep your voice up so that all the jurors hear you.

THE WITNESS: What?

THE COURT: Keep your voice up so that all the jurors can hear you.

THE WITNESS: She came to my house and she was to be hospitalized and she was interested in having something -- a will drawn up, and it was -- she came to my house and in the presence of my daughter and myself and Mr. Fisher and Mrs. Lester.

BY MR. POSTON:

Q. Well, did she -- did somebody at that time type up a will? A. My daughter typed up what she wanted and we had -- I had purchased the house next to me at that time and we called in the plumber and the carpenter as witnesses.

Q. And they witnessed the will at that time? A. They witnessed that will.

Q. Do you know whether or not Mr. Fisher was left anything in this will? [380] A. Yes, Mr. Fisher was mentioned to have the large house at Deale Beach.

Q. Did she -- did you see her in August of 1965? A. Oh, yes.

Q. Did there come a time when she visited your house and told you something about a real estate tax? A. Yes. Mr. Fisher brought

her there to my house. I was on 16th Street. And she had this large place she owned at Deale Beach. They had charged her a lot of taxes and, well, she couldn't use the place at that time, and so she told me she had been to Annapolis and asked for an appeal of these taxes and she danced up and down my floor.

She said, "Now, Emma, here is my \$44." And took it out of the pocket and showed me all the money.

Q. Was she quite pleased about that? A. Very pleased with it.

Q. Well, now, based on your association with her over the years and especially the latter months of her life and your conversations with her -- well, first, tell me, in her conversations, was she clear in her conversations? A. Oh, I would say so.

Q. Was she -- I mean, did she say anything that didn't make sense?

[381] A. Not to me. I learned off of her.

Q. Did she appear to be mentally alert? A. No, indeed.

Q. I mean, did she appear to be mentally alert, I mean --

MR. MALLOY: She has answered.

BY MR. POSTON:

Q. I mean sensible. A. Oh, sure, she was very sensible.

Q. In your opinion, based on these observations, was she of sound and disposing mind? A. Absolutely, she was.

MR. POSTON: No further questions.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. You had been a neighbor of Mrs. Lester's when she lived at 436 New Jersey Avenue, Southeast, when you lived on First Street? A. I lived on First Street and she lived on New Jersey Avenue.

Q. When did you move from First Street? A. I moved in '63.

Q. In 1963? A. That's right.

[382] Q. Now, then, calling your attention to the year of the early part of 1965, did you suggest to Mrs. Fisher -- or Mrs. Lester -- par-

don me -- the availability of a house in your neighborhood at 1525 S Street, Southeast? A. Yes. She was looking ever since I moved over there, she was looking for a house in that neighborhood.

Q. She wanted to be close to you? A. She wanted me so I could be close to someone and she wanted to move over there.

Q. Did you first call her attention to this 1525 S Street, Southeast? A. No, I didn't. We were looking for a house right next door, two doors from me but this house at 1525 S, it was put in the paper and I think Mr. and Mrs. Fisher saw it before we got down to it.

The letter man had recommended to us, in the meantime they told us it had been sold, and Mrs. Lester and Fisher had been there and she was bound to take that house.

Q. So that Mr. Fisher had recommended the house to her then and they then bought the house, or Mrs. Lester bought it. A. That's right. Saw it advertised in the newspaper.

Q. Now, Mr. Fisher did perform quite a few of the [383] details and business help to Mrs. Lester, did he not? A. Would you say that again?

Q. Mr. Fisher was -- performed some business transactions, etc. for Mrs. Lester, like fixing her income tax and things of that kind? A. I know that he took her to the banks because I had seen them many times myself.

Q. Do you know whether he helped -- A. And he took her to the store because he used to stop by my house to see me on the way going and coming lots of times.

Q. Do you know whether he helped with her income tax? A. No, I couldn't say that for sure, because I didn't see it.

Q. With reference to this will in 1952, that was at the time that Mrs. Lester was going to be operated on at Providence Hospital, was it not? A. Yes, that's right.

Q. And she was very much worried about the outcome of the operation? A. Well, I don't say that.

Q. What was the situation then? Didn't you discuss with her making a will and the advisability of having a will [384] when she was going to the hospital? A. No, that was her wishes.

Q. But she did discuss it with you? A. Yes, we have talked it over.

Q. And Mr. Fisher was present when you were talking it over?

A. That's right.

Q. Now, with reference to the will, your daughter -- was she living with you? A. Yes, my daughter was living with me.

Q. And as a result of the discussions a will was then prepared in 1952? A. Yes.

Q. And then you got this carpenter and the plasterer to sign this will? A. That's right.

Q. Now, then, directing your attention to sometime subsequent to that time, did Mrs. Lester tell you that she had destroyed this will?

A. No, I know nothing about that.

Q. Do you remember talking with Mr. Walter Bailey and me in your home? A. I don't know whether she destroyed it or not.

Q. Do you remember talking with Mr. Walter Bailey? [385] You know Mr. Walter Bailey? A. I know both of you. You both were in my home directly.

Q. Did you not tell us at that time -- A. I told you that I had torn up the copy I had had.

Q. Did you not tell us -- A. No, no, I didn't.

THE COURT: Just a moment.

BY MR. MALLOY:

Q. You haven't heard what I am asking you yet. A. Oh.

Q. Did you not tell us that you tore up the copy that you had? A. I tore up the copy that I had.

Q. Did you not tell us that Mrs. Lester tore up the copy that she had because of the fact that Mrs. Fisher had complained because Mr. Fisher was spending too much time with Mrs. Lester?

Didn't you tell us that on that occasion? A. Well, I don't know -- I may have mentioned that but I don't know that fact.

Q. Didn't you tell us that on that occasion when Mr. Bailey and myself were -- [386] A. Well, discussions was made there about that one will and I told you I had it and I had torn it up, the copy.

Q. And didn't you tell us further that Mrs. Lester told you -- A. I told you that I understood Mrs. Lester to say she had torn hers up.

Q. You understood Mrs. Lester -- A. That --

Q. -- to say -- A. -- torn hers --

Q. -- that she had torn hers up too? A. That is what Mrs. Lester told me, she had torn that up.

Q. Oh. Mrs. Lester then told you that she had torn up that copy? A. That's right.

Q. And did she not tell you that the reason she had torn it up was because of the fact that Mrs. Fisher had complained to her that Mr. Fisher was spending too much time and devoting too much attention to her affairs and business?

Did you not tell us at that time? A. Well, I don't know if I could put it in exactly those words.

Q. Well, in substance, then, was that not what you told? [387] A. It could have been.

Q. Now, do you have a sister named Ethel Lowry? A. Yes, I did.

Q. Where does she reside? A. My sister Ethel Lowry is deceased.

Q. Did there come a time when Mr. Fisher roomed with your sister? A. No. I asked Mr. Fisher about that. He rented a house next door to Mrs. Lowry.

Q. Oh, he rented a house? A. He rented a house and said he lived there one year.

Q. You had told us that -- A. My daughter told you that, because I was employed and I didn't know all my neighbors.

Q. But your daughter then says that -- A. That's right.

Q. Your daughter was present at the time? A. She was present. She told you that.

MR. MALLOY: All right. That is all.

THE COURT: Anything further?

MR. POSTON: Nothing further.

THE COURT: You may step down.

(The witness left the stand.)

[388] Whereupon

EVELYN FISHER

was called as a witness by the Caveatee, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Now, Mrs. Fisher, please keep your voice up and speak slowly.

Please state your name and address. A. My name is Mrs. Evelyn Fisher.

THE COURT: No. Everyone in the courtroom has to hear you. You have to speak slowly, loudly, and distinctly. Some of the jurors who have to listen to you are quite a distance away from where you are seated.

Speak slowly, loudly and distinctly, like I am doing, and you may use the microphone. Get closer to the microphone if that will make it easier for you.

What is your name?

THE WITNESS: Evelyn M. Fisher.

THE COURT: What is your first name?

THE WITNESS: Evelyn.

THE COURT: Evelyn Fisher. Very well.

BY MR. POSTON:

[389] Q. What is your address? A. 1319 North Adams Street, Arlington, Virginia.

Q. You are the wife of Raymond Leon Fisher? A. Yes, I am.

Q. Did there come a time when you became acquainted with Emma O. Lester? A. Yes, in 1939.

Q. From 1939 up to the time that she died in September of '65, did you see her frequently? A. Yes, quite often, on the weekends and maybe through the week.

Q. From time to time did you do any chores for her? A. Yes, I washed and I also ironed for Mrs. Lester.

Q. Now, during the summer of 1965 did you have occasion to see her frequently? A. Yes.

Q. Do you want a glass of water or --

(The witness is crying.)

MR. POSTON: Could we have a recess now, Your Honor?

THE COURT: Very well, we will take our mid-afternoon recess at this time.

MR. POSTON: Thank you.

(Whereupon the Court took a short recess.)

[390] THE COURT: Are you ready to proceed now?

MR. POSTON: Yes, Your Honor.

BY MR. POSTON:

Q. Now, Mrs. Fisher, during the summer of 1965, did you have frequent conversations with Mrs. Lester? A. Yes.

Q. Was she clear in her conversations? A. She was.

Q. Was she sensible in her conversations? A. Yes, she was.

Q. In your opinion was she of sound or unsound mind? A. She was of sound mind.

Q. What were your feelings toward Mrs. Lester? A. Mrs. Lester was like a mother.

Q. No further questions.

## CROSS EXAMINATION

BY MR. MALLOY:

Q. Mrs. Fisher, did you have a discussion with Mrs. Lester about your husband spending too much time at her house and devoting too much of his attention to her business? A. Yes, I did.

Q. As a result of that do you know whether or not she tore up a will that she had?

[391] THE COURT: Well, that might call for hearsay, Mr. Malloy.

I suggest you limit your question and make it more specific.

BY MR. MALLOY:

Q. Well, did Mrs. Lester say anything to you as a result of that discussion that she was tearing up a will? A. I did not discuss business with Mrs. Lester, but I do know she had a will.

Q. Do you know whether she tore it up or not? Did she say anything to you about tearing it up? A. Well, I can't answer that. I don't know how you mean.

Q. Well, did Mrs. Lester -- you said you did have discussions with her about your husband spending too much time there? A. Yes, I did.

Q. Did you -- A. But that was a long time ago.

Q. Well, now, did you have any discussion with her or did she ever say anything to you that she had either destroyed or torn up or otherwise mutilated a will?

THE COURT: Now, you are not referring to the will [392] involved in this proceeding?

MR. MALLOY: No, no.

THE COURT: Well, I think you ought to avoid the possibility of confusion. I suggest you make your question more precise.

BY MR. MALLOY:

Q. Did you have any discussion with Mrs. Lester prior to July the

1st, 1965, about tearing up a will which she had theretofore made? A. She had a previous will that she tore up.

Q. That is all.

Now, your husband was employed and had been continuously employed at the Government Printing Office, had he not? A. That's right.

Q. And he worked there in the evening or what is called as the night shift, from five in the afternoon until 1:30 the next morning? A. That's right.

Q. In addition to that, he had a position at one time during the daytime at Sears Roebuck and Company, is that right? A. That is right.

Q. And that extended over a period of four or five years? [393]  
A. Well, I couldn't say how long.

Q. Approximately that time? A. Yes.

Q. Did he also have a position during the day at one time with the D.C. or the Capital Transit Company? A. That's right, during the war.

Q. And that extended, do you know, approximately, for four or five years during the war? A. I think he worked there about ten years on the Capital Transit.

Q. About ten years.

That would be from the wartime on. It started during the wartime about 1942? A. Well, I couldn't say just exactly the date because I don't remember the dates.

Q. But you meant World War II? A. Two, yes.

Q. Did your husband also have a position with the Adams Company in which he helped to send out or deliver certain -- A. That is correct.

Q. Is that still going on or was it -- was that -- do you know what period of time that covered? A. Well, he is still doing that.

[394] Q. Still doing that.

And all during this time, of course, he has been and continued his employment with the Government Printing Office? A. That is correct.

MR. MALLOY: That is all.

Oh, one more question.

BY MR. MALLOY:

Q. Did you have occasion to visit Mrs. Lester's home when she lived at 436 New Jersey Avenue, Southeast? A. Yes, I have. I helped her move.

Q. Did you see Raymond Bailey also help her move? A. One day I saw Raymond move, help us on a Sunday.

Q. Did you have occasion to notice, prior to the move, the condition of the premises in which Mrs. Lester lived? A. Yes, I did.

Q. Did you notice anything with reference to whether or not the rooms were crowded or unkempt or otherwise? A. Well, of course, when she had an apartment house, she had to have all this seasonal stuff in her apartment. She was crowded, yes, but she was clean about it.

Q. You didn't notice any roaches or anything there? A. Yes, there was roaches. I have roaches.

MR. MALLOY: That is all.

[395] MR. POSTON: No questions.

THE COURT: Anything else? You may step down.

(The witness left the stand.)

MR. POSTON: I call Mr. Simmons to the stand.

Whereupon

J. BENJAMIN SIMMONS

resumed the witness stand, having previously been sworn, and was further examined and testified as follows:

**DIRECT EXAMINATION (Recalled)**

THE WITNESS: I have already been sworn.

BY MR. POSTON:

Q. Please state your name and address. A. J. Benjamin Simmons, 709 Milestone Drive, Silver Spring, Maryland.

Q. What is your profession? A. Attorney at law.

THE COURT: Mr. Simmons was previously sworn. You are recalling him?

MR. POSTON: Yes, Your Honor.

BY MR. POSTON:

Q. Do you practice in the District of Columbia? A. Yes, since May 10, 1939, I have been a member of the District of Columbia Bar and also a member of the Maryland and [396] Virginia Bars.

Q. Did there come a time, Mr. Simmons, when you became acquainted with the deceased, Emma O. Lester? A. Yes.

Q. When was this? A. About the last day of September, 1962, Mrs. Lester came to my office along with Mr. Leon Fisher, and Mrs. Lester brought with her at that time a letter which had been addressed to her by John J. Gormley, president of the Deal Beach Citizens Club, of Deale Beach, Maryland.

She outlined to me that based upon the letter and based upon conversations which she and Mr. Fisher had had with Mr. Gormley, that the Citizens Association had held meetings on the matter of her property infringing upon a street, namely, Chesapeake Drive, that was offered for dedication there at Deale Beach at the time the original subdivision was recorded.

They said and alleged that Mrs. Lester's house there on the bay front, which is the house we have been discussing here, protruded four feet into the proposed dedicated right-of-way of Chesapeake Drive.

Across from the protrusion of the house into Chesapeake Drive, Mrs. Lester had built a well, which is a hand-dug type of well about three feet in diameter, with a [397] casing on top of it.

Whereas Mrs. Lester's house protruded into the right-of-way to the south of Chesapeake Drive, the well was on the northern side of Chesapeake Drive, and the Citizens Association by resolution had proposed that that road be cleared of all obstructions, which meant that four feet of Mrs. Lester's house would be taken down and the well would be destroyed, because it was in the right-of-way, allegedly.

I talked with Mrs. Lester and Mr. Fisher about the situation and I ascertained that Mrs. Lester had built her house in 1939, more than 20 years previously.

And I told her that I would have to go into the situation. It was quite complex in a way, but I would have to get the factual situation at hand, to see whether or not, first, whether Chesapeake Drive, when it was offered for dedication, was ever accepted for dedication, and was subject to public improvements.

I told Mrs. Lester and Mr. Fisher that I would have to meet them down on the property, so that I could go over it more carefully with them, and see just what the situation involved.

I did this. That was about three or four days after I first met Mrs. Lester and Mr. Fisher. I met them on the [398] property and I went over it with them and I ascertained that the house did protrude into the driveway, because before the Citizens Association took its position there, that the house did constitute a four-foot protrusion into the right of way, they had a registered surveyor place survey stakes plotting and outlining Chesapeake Drive as originally shown on the Deale Beach plat.

That plat was prepared in 1935.

Mrs. Lester pointed out to me where those stakes were, or had been. Two or three of the stakes were still in place and she had removed some of the other stakes in her -- she became peeved about the stakes being placed there because it was done during her absence, and she just took it upon her own to remove several of those stakes.

They later filed a charge against her for removing the survey stakes, and that case was dismissed in court, on a so-called criminal charge.

Nevertheless, I told Mrs. Lester, and Mr. Fisher was there on the scene. We looked over the property very carefully. I saw the roadway that had been used there for more than twenty years going in and out of the property.

I ascertained from Mrs. Lester and Mr. Fisher that she had improved that road from time to time over the years by placing oyster shells and stones on it, and the upkeep of [399] that road continuously for the approximately 24 or 25 years that Mrs. Lester had purchased the lot and built her house, had been maintained by her, all those under her supervision.

I, therefore, drafted a letter to Mr. Gormley, the president of the Deale Beach Citizens Association, a copy of which I have here.

That letter was dated October 1, 1962.

MR. MALLOY: If Your Honor please, I think that Mr. Simmons could shorten this rather than have it --

THE COURT: I think we are going into too many details concerning this transaction.

MR. POSTON: Well, Your Honor, we want to show the complicated nature of this and show the understanding that Mrs. Lester had to --

THE COURT: Well, I know, but I am not going to try the law suit involving the Deale Beach property.

Where is Deale Beach, by the way?

THE WITNESS: Deale Beach, Your Honor, is in Anne Arundel County. You go down to Upper Marlboro and take the road across there. I am not familiar with it. I have been there many times but it is hard to --

THE COURT: Is it on the Chesapeake or is it --

THE WITNESS: Yes, it is on the Chesapeake Bay.

THE COURT: Well, you have answered.

[400] THE WITNESS: Not too far down from Annapolis, about a 15-minute drive perhaps.

Anyway, to make it short, I told the president of the Citizens Association that we maintained that Mrs. Lester had a right to continue to have her improvements where they were located and we did not propose to move any part of the house or any part of the well.

Thereupon they obtained counsel and I conferred with counsel. We were unable to get anywhere and right after that Mr. Mark, who owned the -- who had recently purchased an area of land to the north of Mrs. Lester -- it is over on the north side of Chesapeake Drive -- that was originally set aside as a so-called reserved area, which meant it was for the use of the lot owners of that resort area.

It was never used over the years and the developers sold that land to Mr. Mark about two years prior to this time and he proceeded to erect a fence across Mrs. Lester's right-of-way --

MR. MALLOY: If Your Honor please, I think that he can shorten this.

THE COURT: I don't think we should go into all these details of this transaction, Mr. Poston.

MR. POSTON: Well, let me pose another question.

[401] THE COURT: Suppose you ask the next question.

BY MR. POSTON:

Q. Well, now, how long did you -- did she at that time when -- she retained you as counsel, is that correct? A. Yes, she did.

Q. How long did you work with her on this before you came to trial?

Did there come a time when you came to trial on this? A. We -- when they erected the fence, that climaxed the situation.

THE COURT: Just a minute.

THE WITNESS: We --

THE COURT: Just a minute. Repeat your question.

BY MR. POSTON:

Q. Did there come a time when you went to trial on this matter?

A. Yes, we went to trial in the case.

THE COURT: Now ask your next question.

THE WITNESS: I am going to give the date, Your Honor, if I may.

THE COURT: Very well.

THE WITNESS: On September 23, and September 24, 1963, we had

the trial of this case in the circuit court of [402] Anne Arundel County at Annapolis, Maryland.

BY MR. POSTON:

Q. Now, up to that time, from the time she retained you until the time of trial, was she of any assistance to you in preparing your case?

A. Yes, she was greatly. She and Mr. Fisher also, particularly Mr. Fisher, because as I pointed out before, we needed to establish that she had used this access road --

THE COURT: No. The question is whether she was of assistance.

THE WITNESS: Yes, she was.

BY MR. POSTON:

Q. Did she have a clear understanding of the problem involved?

A. I think she did comprehend it very well because she understood that if this road was opened up, she would have public beach area right there by the side of her house and right in her front yard.

She was very disturbed over it.

Q. Now, at the trial, did she testify? A. Yes, she did.

Q. Will you describe the nature of her testifying? A. Her testimony was -- we brought out in her testimony [403] that when she purchased the lots, there were -- one, two, three, four, five -- she purchased six lots.

By her testimony I entered into evidence the deed where she purchased the lot.

I entered into evidence under her testimony the contract when she built the house there in 1939.

We had a number of photographs, probably five or six, showing various photographic shots of the situation there on the premises.

We offered those in evidence, pursuant to Mrs. Lester's testimony.

Q. And how long did she testify in the case? A. Oh, 45 minutes to an hour, perhaps.

Q. Was she responsive to your questions? A. Very much so.

Q. Was she a good witness? A. Excellent witness.

Q. Now, how long did this trial last? A. Two days, September 23 and September 24, 1963, and it went on into the evening because after the trial was adjourned, Judge Sachs, the trial judge, went and visited the scene with us and looked over the property.

Q. Now -- [404] A. I said went down with us. He went down with counsel for both sides.

Q. Now after the trial was there any difficulty with her, as far as your services were concerned? A. Yes. After September 24 and we left the courthouse and we had the usual discussions about the case -- she asked me when the case would be decided, because the judge announced at that time that he was taking the case under advisement.

And I told her that I could not be precise about that, but I thought it would be a matter of a few days or maybe a couple of weeks, and that was the best I could answer that question.

Q. So, what happened? A. Weeks went by and Mrs. Lester would telephone me or Mr. Fisher would telephone me or they would both telephone me asking when we could expect a decision.

I could only tell them that I was -- I didn't know, that the judge still had the case under advisement and I could not -- I was sorry but I could not give them any information as to when there would be a decision rendered in the case.

That became more acute perhaps as the months went by. I say months went by because it was not until June 14, 1965 almost -- lacking three months of being two years -- before a [405] decree was entered in the case.

Q. Was -- A. At that time, prior to that time I felt badly about it and Mrs. Lester also felt upset about it and she expressed it to me in that manner.

She indicated, asked me if it would do any good to have someone write the Governor. I told her not to do that.

She asked me if she could get a Senator or Congressman to write the judge. I told her not to do that.

She asked me if she could go down and talk to the judge. I told her not to do that.

But finally, maybe two or three months before the case was decided, she did go down to see the judge, she and Mr. Fisher and learned that the judge had had a heart attack and had been incapacitated for a few months.

I was very happy indeed when the judge's secretary called me and told me that the judge wanted to meet with counsel, that he wanted to frame a decree in the case.

And I got the certified copy of the decree on June the -- the decree is dated June 14, 1965 -- and I obtained a certified copy the next day or two and I wrote Mrs. Lester a letter, telling her that -- enclosing a copy of the decree. My letter is dated June 15, 1965.

[406] And two days later she came to my office with Mr. Fisher.

Q. Let me interrupt you a minute. What was the decision of the court? A. Pardon?

Q. What was the decision of the court in this case? A. One hundred percent in our favor.

Q. After she learned of this did she -- what were her feelings toward you then? A. She was very, very delighted over it. I was going to relate that when she came to my office in response to my letter of June 15, 1965, she came to my office on June 17, 1965, along with Mr. Fisher, and she was very, very happy and elated over the decision.

She owed me a slight balance on my retainer fee, which she paid, and she -- to be specific, it was \$275 which she owed -- she counted it out to me in twenty-dollar bills and some odd five-or ten-dollar bills and that was the last time I saw her.

Q. During the course of your association with her on this case, tell us how she dressed. A. Mrs. Fisher was a woman that dressed -- she was clean --

[407] THE COURT: You don't mean Mrs. Fisher.

THE WITNESS: Mrs. Lester. I am sorry, Your Honor. Mrs. Les-

ter dressed very -- she was neat and tidy, but she wore what appeared to me to be dresses that had been laundered and they were always nice and clean looking and she dressed that way also -- personally, she looked like to me she was clean and used soap and water.

That is the way she impressed me.

BY MR. POSTON:

Q. Well, now, during the course of the litigation and her telephone conversations with you after the litigation, with reference to these conversations, was she rational? A. Yes.

Q. Was she -- did she ramble in her conversations? A. No.

Q. Was she coherent? A. Yes.

Q. Was she mentally alert? A. Yes.

Q. Did she have a grasp for the problems involved in that case?

A. Very much so. Mrs. Lester, I thought was a remarkable woman because of her grasp of business -- transaction of [408] her business. She knew exactly what she wanted.

Q. How was her memory? A. Her memory was excellent.

Q. Now, based on your observations, do you have an opinion as to whether or not, upon the occasion of your last communication and visit with her, as to whether she was of sound and disposing mind and able to enter into a valid contract or to execute a will? A. Yes, I do have an opinion.

Q. What is this opinion? A. My opinion is that Mrs. Lester had complete testamentary capacity, that she had the ability to make a valid deed or contract.

Q. All right. Now, upon the occasion of her last visit to your office in June of 1965, was there any mention of a will at that time?

A. Yes, there was a discussion at that time regarding a will.

Q. What did she say? A. I had learned from Mrs. Lester that her mother and father, of course, were deceased, that she had no spouse, and I discussed this with her --

[409] MR. MALLOY: I object, if Your Honor please, to this conversation.

THE COURT: Beg your pardon.

MR. MALLOY: I object to the conversation because of the conversation with the deceased in a confidential relationship. There hasn't been any --

THE COURT: Will counsel come to the Bench.

(Whereupon counsel approached the Bench and the following proceedings were held:)

THE COURT: What do you say about that, Mr. Poston?

MR. POSTON: With reference to attorneys, I don't think -- I think attorneys are not bound by that privilege in the same way that doctors are, from what I gather in my research.

THE COURT: You don't think what?

MR. POSTON: That the same rule applies to attorneys as applies to physicians in this circuit.

THE COURT: Well, yes, assuming so, the question is whether this was a confidential communication.

You know, I would without any hesitancy sustain your objection, but the reason I asked you gentlemen to come to the Bench is this: The witness is the nominated executor. Doesn't that change the situation?

[410] MR. MALLOY: No, because he isn't -- if he had been -- if this had gone to probate -- in other words, if the will had gone to probate where he was the executor.

THE COURT: I know, but that isn't the point I have in mind.

MR. MALLOY: This is a self-serving declaration, if Your Honor please.

THE COURT: No, that is not a self-serving declaration. A self-serving declaration is a statement made by a third party, his testimony concerning it.

Now, I am going to ask you, Mr. Poston, to make a proffer of proof. What do you expect to elicit from this witness?

MR. POSTON: Very well.

THE COURT: Specifically, what do you expect him to testify?

MR. POSTON: I expect him to say that she discussed generally the matter of making a will but she didn't make any definite commitment.

THE COURT: Well, it is of no moment.

MR. POSTON: It is really not.

THE COURT: I will sustain the objection.

[411] (Whereupon counsel resumed their places at the table and the following proceedings were held:)

MR. POSTON: I withdraw that question.

BY MR. POSTON:

Q. Mr. Simmons, at the trial of this case, did any of the relatives of Mrs. Lester appear? A. No, they did not. Neither one of the sisters or brother appeared in the case.

In my conversations with Mrs. Lester I learned that they had been going to the property at sometime or another during the 25 years, and would be purported witnesses, but that at Mrs. Lester's directions, I did not contact them because she told me not to.

Q. Did there come a time when you met a man by the name of Harold Haynes? A. Yes.

Q. When was this? A. That was at the time after -- shortly after Mrs. Lester's death. Mr. Fisher brought the will and certain papers to my office and I notified -- I learned that the brother and two sisters were her sole heirs at law and next of kin, and I wrote them a letter and told them that --

THE COURT: No, just a moment. The question refers [412] only to Haynes, doesn't it?

MR. POSTON: Yes, that's right.

THE WITNESS: That is when Mr. Haynes came into the picture, when I wrote them. He called me in response to my letter to Walter Bailey and stated that he was Walter Bailey's attorney and would come to my office as I had requested.

BY MR. POSTON:

Q. Now, let me ask you a question.

Did this occur after the death of Mrs. Lester? A. Yes, it did.

Q. This was after you had sent letters out to the heirs at law? A. Yes.

Q. Was your first contact with him on the phone? A. Yes.

Q. At that time what did he say? A. He said he was the attorney for Mr. Walter Bailey and would arrange for he and Mr. Walter Bailey to come to the office and I asked him if he was the attorney for Mr. Bailey's two sisters, so that we could have the conference with all of them at one time, and he stated that he would check on that to see if we could work out some arrangements whereby all three of them could come to the office at the same time.

[413] And a few days later he called me back and said he had made the arrangements to represent all three of them and we made an appointment.

THE COURT: What is the relevancy of all this, Mr. Poston?

MR. POSTON: Well, other than to show Mr. Haynes' interest in the case, Your Honor --

THE COURT: Well, he was attorney for these people. That is all we have to know.

Let's try to shorten matters and not prolong trivia.

BY MR. POSTON:

Q. Mr. Fisher, during your association with Mrs. Lester, did you also become acquainted with Mr. Fisher? A. Yes, I --

THE COURT: The answer is yes.

THE WITNESS: Yes, I did.

BY MR. POSTON:

Q. How frequently would you see Mr. Fisher? A. I saw Mr. Fisher almost with the same regularity and I believe it was -- now that I think about it, he was either with her at all times or had brought her to the office and would come in later. It seemed that he always

transported her or provided her transportation and I think for the most part [414] he was always there.

Q. Well, from your observations, what was the relationship between Mrs. Lester and Mr. Fisher? A. I think he was her right arm, so to speak, in handling her transactions for her, and helping her take care of her business, taking her to the grocery store, taking her to this place and that place.

Q. From your observations what were her feelings toward Mr. Fisher? A. They were -- seemed to be very close to each other. She relied on him heavily and she called him Leo. The only name I ever heard her call him was Leo.

MR. POSTON: I have no further questions.

THE COURT: Any cross examination?

MR. MALLOY: Yes, Your Honor.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. With reference to this case down there, Mr. Simmons, hasn't there been an appeal taken in the case? A. That is correct. An appeal is pending in the Court of Appeals in Maryland at this time.

Q. And the appeal was --

THE COURT: I am not going to try that Maryland case in this courtroom.

[415] MR. MALLOY: No. Well, he has said, if Your Honor please, that she was very happy about this --

THE COURT: Well, she was. I do not care whether there is an appeal pending. She is dead now.

BY MR. MALLOY:

Q. So that the case has not been completed then?

THE COURT: I am going to strike that question out because it has nothing to do with the case, Mr. Malloy. Anything that shows her mental attitude is relevant but whether there is an appeal pending now that she is dead is immaterial.

MR. MALLOY: I think if Your Honor --

THE COURT: No. I have ruled, Mr. Malloy. I am going to exclude that.

Gentlemen, we have to make faster progress. We have other cases waiting to be tried.

BY MR. MALLOY:

Q. You have stated that Mr. Fisher was present with Mrs. Lester on all times when she came to your office? A. That is my recollection, Mr. Malloy, that he was present --

THE COURT: His answer is yes.

THE WITNESS: Yes.

[416] BY MR. MALLOY:

Q. And you have stated that she -- they were very close to each other and she relied on him explicitly in the matters. A. That is my impression, that he was her right arm.

Q. Now, with reference and prior to the filing of the caveat in this matter I talked with you and advised you that I represented all -- Mr. Walter Bailey and Mrs. Pinney and Mrs. Bailey, did I not? A. Yes, you subsequently came in as their counsel and I suppose succeeded Mr. Haynes.

Q. Did I tell you that Mr. Haynes was a relative of theirs and had merely accompanied them? A. I don't recall your telling me that.

Q. You heard Mr. Haynes so testify on the stand, did you not? A. I did.

MR. MALLOY: That is all.

MR. POSTON: Your Honor, forgive me, but there was one question that I wanted to ask that I forgot to ask.

THE COURT: Very well.

#### FURTHER DIRECT EXAMINATION

BY MR. POSTON:

Q. With regard to her eyesight, do you have any knowledge [417]

of her ability to see? A. Yes, I do. Mrs. Lester could identify photographs. She could read printed matter. She could identify, as I said, the deed, the contract, and all, offered in evidence, and again there I had the impression that her eyesight was excellent for a woman of her age because she never wore glasses.

MR. POSTON: No further questions.

THE COURT: You may step down.

(The witness left the stand.)

MR. POSTON: Your Honor, I don't have any more witnesses here.

THE COURT: Are you going to have any more?

MR. POSTON: About two or three more, Your Honor.

THE COURT: We will recess at this time until tomorrow morning.

Ladies and gentlemen of the jury, we are going to recess this trial until tomorrow morning at ten o'clock. You may be excused at this time and please be back in the courtroom a few minutes before ten o'clock tomorrow morning.

(Whereupon at 3:45 P.M., the hearing of this cause was adjourned until 10:00 A.M., Tuesday, March 22, 1966.)

[420] THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: You may proceed.

MR. POSTON: Call Mr. Jones to the stand.

DAVID E. JONES

called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Now speak loudly and slowly, please. What is your name? A. David E. Jones.

Q. What is your address? A. Home address?

Q. Yes. A. 7111 Foster Street, District Heights, Maryland.

Q. Where are you employed, Mr. Jones? A. In the monument firm of Wilson & King in Washington.

THE COURT: And who are they?

THE WITNESS: It's the name of the firm.

THE COURT: I know, but what kind of firm is it?

THE WITNESS: Monument firm.

[421] BY MR. POSTON:

Q. Is this graveyard monuments? A. Yes, it is.

Q. And what do you do for that firm? A. I manage it. I am the owner.

Q. Did there ever come a time when Emma O. Lester came to you with regard to purchasing a monument? A. Yes, there was.

Q. And when was this? A. In July of '65.

Q. And did you at that time talk to her personally? A. Yes, I did. I transacted the business.

Q. And was this done at your place of business? A. Yes, she came to me, yes.

Q. And did you have a conversation with her at that time? A. Yes, I did.

Q. Did she ramble in her conversation? A. Not to my recollection, no.

Q. Was she clear in her conversation? A. Yes, she was.

MR. MALLOY: If Your Honor please, I submit that he should ask questions as to what it was, instead of asking [422] leading questions.

THE COURT: Well, I don't know of any other way to ask that. I will allow that.

BY MR. POSTON:

Q. Was she coherent in her conversation? A. She was.

Q. Did you have any difficulty dealing with her? A. None whatsoever.

Q. Did she appear to understand the nature of the transaction?  
A. Yes, indeed.

Q. Do you have the original -- did you enter into a written contract? A. I did, yes.

Q. Do you have the original of that contract with you? A. I do.

Q. Could I see it?

(The witness complied.)

MR. POSTON: I offer this contract into evidence as Plaintiff's Exhibit No. 3.

THE COURT: Let it be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 3 marked in evidence.

[423] (Monument contract marked Plaintiff's Exhibit No. 3 and received in evidence.)

BY MR. POSTON:

Q. Mr. Jones, based on your conversation with Mrs. Lester --

THE COURT: Just a moment, if you please.

MR. MALLOY: I object, if Your Honor please. There hasn't been sufficient --

THE COURT: Just a minute. Let us wait until he finished the question.

You may pass this to the jury if you wish, or read it, either way.

(The exhibit was handed to the jury.)

THE COURT: Now you may proceed.

BY MR. POSTON:

Q. Now based on your conversation with her and your business transaction with her, do you have an opinion as to whether she was of sound or unsound mind?

MR. MALLOY: I object, if Your Honor please

THE COURT: On what ground?

MR. MALLOY: On the grounds that this is the only transaction that this witness had with her and he didn't have sufficient --

THE COURT: Suppose you go into a little more [424] detail as to how long this conversation took and what transpired and so on. I think there is some merit in Mr. Malloy's point.

BY MR. POSTON:

Q. How long did this transaction take, Mr. Jones? A. Well, it's hard to recall exactly, but I would say roughly a half an hour. Maybe it was a little longer. It's some little time ago. I didn't have any reason to, you know, make any emphasis on trying to remember.

Q. Did you notice anything unusual about her conversation or her actions? A. No, I did not.

THE COURT: Why don't you bring out what was said? I am not directing that you do that, but I am suggesting that you might want to do it.

Q. Do you recall what was said at that time? A. Well, in making a sale of a monument the conversations are quite similar. I can't exactly remember that conversation.

THE COURT: Do you remember what she said to you when she first came in?

THE WITNESS: No, sir, I don't.

BY MR. POSTON:

Q. Do you recall the substance of the conversation? A. The substance of the conversation. She came in to [425] buy a monument for her family lot in Cedar Hills Cemetery. I have a display of monuments there. I took her outside and showed her what I had and gave her prices and she made a selection and we wrote up a contract. She placed a small deposit. And when the work was completed she went out, inspected it and paid me; by the way, very promptly.

THE COURT: Did she sign the contract?

THE WITNESS: Yes, she signed the contract. Her signature is there, sir.

BY MR. POSTON:

Q. Based on this business transaction and your conversation with

her, do you have an opinion as to whether she was of sound or unsound mind? A. I do. I think she was --

THE COURT: Just a moment. Just answer yes or no, first.

THE WITNESS: Yes.

MR. MALLOY: I object, if Your Honor please, on the ground that he says he didn't remember the conversation, what it was. It only took a half-hour or possibly a little longer and he says that he didn't remember the details, and I submit that it's not --

THE COURT: I am going to overrule the objection. [426] I think these matters to which you refer go to probative weight rather than to the admissibility.

I might say this, that if there was something wrong he would be more likely to remember than if everything was normal.

THE WITNESS: I remember the woman very well.

THE COURT: Just a moment.

He may answer.

BY MR. POSTON:

Q. What is your opinion, Mr. Jones? A. I would say she was a very sane person.

MR. POSTON: No further questions.

THE WITNESS: Very competent.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. Mr. Jones, do you remember that it was necessary, or that she didn't own the lots and it was necessary to have the members of the family who did own the lots? A. Yes, I remember that, yes. It happens very frequently.

Q. Did you then suggest to Mr. -- was a Mr. Fisher with her at this time? A. I don't know the man by name.

[427] Q. Do you know whether there was a man there with her? A. Yes, her nephew was with her at the time.

Q. Do you know -- was it a Mr. Fisher? A. I don't know his name.

Q. Do you know whether or not you had a conversation then with reference to procuring the consent of the owners of the lot? A. Yes, we did have a conversation with reference to that.

Q. Did you give him any form on that? A. Yes, I did.

Q. You gave him a form so that he could procure the signature of the owners of the lot? A. That is right, I did.

Q. In other words, she didn't have authorization to have the headstone, right? A. That is true, the lot was not in her name.

Q. Did that have any significance to you? A. No, sir, none at all.

MR. MALLOY: That is all.

MR. POSTON: No further questions.

THE COURT: You may step down.

Will counsel come to the bench, please.

[428] (At the Bench:)

THE COURT: May I call counsel's attention to the fact that both Elsie Pinney and Walter Bailey and perhaps one or two others testified on cross examination, although they were witnesses for the cava-  
eators, that in their opinion on July 21, 1965, when the deceased made the contract for the headstone, she was mentally competent. So I as-  
sumed there was no dispute as to her competency on July 25th.

MR. MALLOY: Well, I think that there was a question because Elsie says that she wasn't sure of the date. As a matter of fact, on July 25th --

THE COURT: She wasn't sure of what?

MR. MALLOY: She wasn't here. In other words, she was talking about another date because she was in Europe on July 25th and didn't see her. She didn't see her.

THE COURT: Well, Walter Bailey was there.

MR. MALLOY: Walter signed the paper.

THE COURT: I understand. But he was asked on cross examina-

her, do you have an opinion as to whether she was of sound or unsound mind? A. I do. I think she was --

THE COURT: Just a moment. Just answer yes or no, first.

THE WITNESS: Yes.

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THE WITNESS: I remember the woman very well.

THE COURT: Just a moment.

He may answer.

BY MR. POSTON:

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MR. POSTON: No further questions.

THE WITNESS: Very competent.

#### CROSS EXAMINATION

BY MR. MALLOY:

Q. Mr. Jones, do you remember that it was necessary, or that she didn't own the lots and it was necessary to have the members of the family who did own the lots? A. Yes, I remember that, yes. It happens very frequently.

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Q. Did you give him any form on that? A. Yes, I did.

Q. You gave him a form so that he could procure the signature of the owners of the lot? A. That is right, I did.

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MR. MALLOY: That is all.

MR. POSTON: No further questions.

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MR. MALLOY: Well, I think that there was a question because Elsie says that she wasn't sure of the date. As a matter of fact, on July 25th --

THE COURT: She wasn't sure of what?

MR. MALLOY: She wasn't here. In other words, she was talking about another date because she was in Europe on July 25th and didn't see her. She didn't see her.

THE COURT: Well, Walter Bailey was there.

MR. MALLOY: Walter signed the paper.

THE COURT: I understand. But he was asked on cross examina-

tion whether in his opinion she was competent to sign that contract and he said yes.

MR. MALLOY: I don't remember that.

THE COURT: Well, I have it in my notes.

So I assumed that that aspect of the matter is not [429] in dispute.

MR. POSTON: Your Honor, I had a witness called, Mrs. Burkette. She's got the flu, but her husband knows just about as much as she does and he is here. Could we have permission to use him? He is not on our list of witnesses.

THE COURT: Is there any objection?

MR. MALLOY: I think in the interest of justice if she is sick I have no objection.

THE COURT: Very well.

(In Open Court:)

MR. POSTON: Mr. Burkette.

#### OSCAR R. BURKETTE

called as a witness, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. POSTON:

Q. Now keep your voice up, sir, and speak slowly. What is your name? A. How is that?

Q. What is your name? A. Burkette, Oscar R. Burkette.

Q. And what is your address? A. 1524 S Street, Southeast.

[430] Q. Did you know Emma O. Lester? A. I sure did.

Q. And when did you become acquainted with her? A. Oh, a couple weeks after she moved over there.

Q. Moved over to where? A. Well, she moved right across the street. I don't remember the house, but it was 15-something. I don't remember just the number of the house.

Q. But she lived across the street from you? A. Right across the street.

Q. And when did she moved in there, about? A. Well, I don't remember what the date was that she moved in there, but I think somewhere along about April or somewhere along there. I don't remember the date because I was working, you see.

THE COURT: April of what year?

THE WITNESS: It was difficult for me to keep up with those things.

THE COURT: April of what year?

BY MR. POSTON:

Q. What year? A. It was last year when she moved in.

Q. Did there come a time when you saw her and talked [431] with her? A. I talked with her several times, lots of times.

Q. How was her conversation? Did she ramble in her conversation? A. No, sir; no more than you or I.

Q. Was she clear in her conversation? A. Yes, sir; yes, sir.

Q. Was she mentally alert? A. Yes.

Q. Did you see her frequently during the summer of 19-- A. Seen her practically every day.

Q. Did you have conversations with her? A. Well, not particular every day because I would take her food over and give it to her and stuff like that. Me and my wife would fix food and take it over to her. We wouldn't have no particular conversation, but my wife used to go over there and sit with her and talk with her at night.

Q. But you have had conversations with her? A. Oh, yes.

Q. Now, based on your conversations and your association with her, in your opinion was she of sound or unsound mind? A. Well, she had as good a mind as I got or you or [432] anybody else, as far as I could see.

Q. Do you feel it was a sound mind? A. Yes, sir, she had a sound mind.

MR. POSTON: Excuse me just a moment.  
No further questions.

## CROSS EXAMINATION

BY MR. MALLOY:

Q. How do you spell your name? A. B-u-r-k-e-t-t-e.

Q. Are you the Mr. and Mrs. Burdette who were bequeathed the sum of \$500 in the will? A. Well, I heard that.

Q. Did you receive a notice from Mr. -- A. Yes, sir.

Q. -- from Mr. Simmons.

And your name is spelled Mr. and Mrs. B-u-r-d-e-t-t-e? A. Well, now, that could have been misspelled right there.

Q. But you were neighbors? You were neighbors of -- A. Just across the street, yes, sir.

Q. And you had known her from about April? A. About a couple weeks after she moved over there till she passed away, and I was there when they went in and [433] got her.

Q. The police had to break in the place in order to -- A. Yes, sir.

Q. She had fallen in the house? A. My wife give the police permission to do it because we knew there was something because we looked after her all the time that we possibly could.

Q. Then you were named in the will B-u-r-d-e-t-t-e? A. So far as I know, yes.

MR. MALLOY: That is all.

MR. POSTON: No questions.

THE COURT: You may step down.

MR. POSTON: Mr. Galante, please.

ALEX GALANTE

called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POSTON:

Q. Now keep your voice up and speak slowly, please. What is your name? A. Alex Galante.

Q. What is your address? A. 1523 S Street, Southeast.

[434] Q. Did you know the deceased, Emma O. Lester? A. Yes.

Q. When did you become acquainted with her? A. A few days after she had moved in. I think it was the month of May.

Q. And where did she move in? A. 1525 S Street, Southeast.

Q. Was this nextdoor to you? A. Yes.

Q. From May of 1965 until the time she died did you have occasion to have any conversations with her? A. Yes, quite often.

Q. In her conversations did she ramble? A. No, sir.

Q. Was she clear in her conversations? A. Very clear.

Q. Was she sensible in her conversations? A. Yes.

Q. In your opinion was she of sound and disposing mind? A. Very much so.

Q. With regard to her eyesight, did you notice any difficulty she was having seeing and getting around? [435] A. None at all.

MR. POSTON: No further questions.

CROSS EXAMINATION

BY MR. MALLOY:

Q. She lived at 1525 S Street, Southeast? A. Yes, sir.

Q. And you lived at 1523 S Street? A. Yes, sir.

Q. You had never known her before May 1965, had you? A. No, sir.

Q. You had never seen her before that time? A. No, sir.

Q. Now with reference -- you said that she could see very well?

A. I did.

Q. There wasn't any question that she resided at 1525 S Street, Southeast, is there? A. Pardon, sir?

Q. There isn't any question that she did reside at the address 1525 S Street, Southeast? A. No, sir, there isn't any question.

Q. No question about that.

MR. MALLOY: May I see the will?

[436] MR. POSTON: I object to this, Your Honor, showing him the will and asking him her address.

THE COURT: I can't pass upon any objection to a question until after the question is asked.

BY MR. MALLOY:

Q. I ask you to read that first line. A. "Emma O. Lester, 1625 S Street, Southeast."

Q. Did she live at 1625 S Street? A. She lived at 1525.

MR. MALLOY: That is all.

THE COURT: You may step down.

MR. POSTON: No questions.

Mrs. Geraldine Bracken.

THE COURT: Will counsel come to the bench.

(At the Bench:)

THE COURT: Mr. Poston, I asked you at the end of yesterday's session how many more witnesses you had and I thought you said two.

MR. MALLOY: That is what he said.

MR. POSTON: I think I said two or three. This is the last one.

THE COURT: Well, I am not going to preclude you even if you have any more, but I am just surprised to have the answer two --

[437] MR. POSTON: We got so many I forgot some.

MR. SIMMONS: Yesterday, Your Honor, one was ill.

MR. MALLOY: As a matter of fact, Mrs. Burkette, I had talked to her, but I didn't want to raise any point in it, although I had questioned her at more length.

THE COURT: Very well.

(In Open Court:)

## GERALDINE BRACKEN

called as a witness, having been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. POSTON:

Q. Please keep your voice up and speak slowly. What is your name? A. Geraldine Bracken.

Q. And what is your address? A. 1923 16th Street.

Q. Did you know the deceased, Emma O. Lester? A. Yes, I did.

Q. And for how many years did you know her? A. Forty.

Q. Was she a friend of yours? A. Oh, yes.

[438] Q. And is your mother Mrs. Tull? A. Yes, she is.

Q. Did you have occasion to see Mrs. Lester during the summer of 1965? A. Yes, I did.

Q. Did you see her frequently? A. Yes, I did.

Q. Did you live close to her? A. Approximately a block and a half from her.

Q. Did you during the summer of 1965 visit at her home frequently? A. Yes, I did.

Q. Did she during the summer of 1965 visit at your home frequently? A. Yes, she did.

Q. Did you have frequent conversations with her? A. Yes, I did, over the telephone. She called me.

Q. Did you also have conversations with her when you visited her?

A. Oh, yes.

Q. And when she visited you? A. Oh, yes.

Q. Did she ramble in her conversations? [439] A. No, she didn't.

Q. Was she clear in her conversations? A. Yes, she was.

Q. Was she completely sensible in her conversations? A. Oh, yes.

Q. Now, based on your acquaintanceship with her and your obser-

vations, in your opinion was she of sound and disposing mind? A. She certainly was.

Q. Do you have any knowledge of a prior will that she executed?

A. Yes, I do.

Q. Do you know approximately when this was? A. In '53.

Q. Was this prior to her going into the hospital for an operation?

A. That's right.

Q. And did you play any part in the preparation of this will? A. I typed the will up.

Q. Was this will typed up in accordance with her instructions? A. That's right.

[440] Q. Who witnessed that will? A. A plumber and a carpenter that mother had working in the house that she was doing over, nextdoor to where we were living at the time on First Street Southeast.

Q. In this will did Mrs. Lester leave anything to Mr. Fisher? A. Yes, she did.

Q. What did she leave him? A. The beach property.

MR. POSTON: No further questions.

#### CROSS EXAMINATION

##### BY MR. MALLOY:

Q. With reference to this will which you say was made in 1953, was Mr. Fisher there when it was -- when you were discussing it with Mrs. Lester and you and your mother? A. He brought her to the house that day.

Q. She was at the time preparing to go to Providence Hospital for a cancer operation, is that right? A. We didn't know if it was cancer then or what it was, that she was preparing to go for an operation.

Q. And you did then prepare that paper at her request? A. That is right.

Q. Now, then, calling your attention later, Mrs. Lester [441] instructed that that be destroyed, did she not? A. I don't know because I never held the will.

Q. Did your mother have it, do you know? A. No.

Q. Who had it, if you know? A. Mrs. Lester had the will.

Q. As far as you know? A. As far as my knowledge is.

Q. Now, you say you kept on good terms with Mrs. Lester from 1953 until 1965? A. That's right.

Q. In 1965 you -- at the time the will in 1953 were living on First Street or your mother was living on First Street and Mrs. Lester was at 436 New Jersey Avenue, is that right? A. That's right.

Q. And later your mother moved to your address, and where did you say that address was? A. 1923 16th Street, Southeast.

Q. And you said that that was about a block and a half from the place to which Mrs. Lester moved later, that is, 152-- A. Approximately in there, yes.

[442] Q. About a block and a half? A. Yes.

Q. And you were on good terms with her? A. Yes.

Q. Were you on good terms with her on July 1st, 1965? A. Yes, I was.

Q. Did you type a paper writing purporting to be her will on July 1st? A. No, I did not.

Q. The only paper you typed was the one in 1953? A. That's right.

MR. MALLOY: That's all.

MR. POSTON: No questions.

THE COURT: You may step down.

MR. POSTON: Plaintiff rests, Your Honor.

MR. MALLOY: I will try to make this short, if Your Honor please, and I think that I can possibly do it by introducing documents.

I have here, with reference to the Office of the Administrator of Rent Control, I have the findings, which is a public record and I therefore will introduce that in evidence.

THE COURT: Let's take one at a time.

(Pause.)

[443] MR. POSTON: Your Honor, may counsel approach the bench?

THE COURT: Yes, indeed.

(At the Bench:)

MR. POSTON: Your Honor, I think he has rested. He doesn't have a right to rebuttal, does he?

MR. MALLOY: Fisher brought that out.

THE COURT: Do you object or don't you object?

MR. POSTON: I want to get an understanding of whether he has a right of rebuttal.

THE COURT: This is rebuttal now.

MR. POSTON: Mine was rebuttal, isn't that right?

THE COURT: Then this is surrebuttal. No, yours wasn't rebuttal -- yes, in a way it was. They have the burden of proof on the three objections to the will. Then this is surrebuttal. They have a right to proceed.

MR. POSTON: I think it is immaterial.

MR. MALLOY: Fisher brought it out.

THE COURT: Do you object to this?

MR. POSTON: I object to this on the basis it is immaterial.

THE COURT: On what basis is this admissible?

MR. MALLOY: Fisher brought out on his that Mrs. [444] Lester was the owner of the place. Marie Bailey had testified that they were both claiming ownership.

THE COURT: In the first place, the question is absolutely immaterial and it is a collateral matter and you are bound by the witness' answer on cross examination. In the second place, this document is incompetent as proof of any fact involved in this case because this proceeding is between different parties.

Objection sustained.

MR. MALLOY: Well, then could I make a tender? In other words, could I put Mrs. Marie Bailey on to show that she received this paper?

THE COURT: This document is not admissible. You may have it marked for identification, if you wish, to preserve your rights.

THE DEPUTY CLERK: Defendant Exhibit No. 2 marked for identification.

(Findings of Rent Control Administrator marked Defendant's Exhibit No. 2 for identification.)

MR. MALLOY: Now I wanted to introduce the death certificate of Carol Bailey. When Mr. Fisher was testifying he said that after Carol's death certain things were done, and [445] there isn't anything in the record to show when Carol died, so I wanted to introduce the death certificate to fix the date.

THE COURT: You have a right to do that, unless you want to stipulate the date.

MR. POSTON: When Carol died?

MR. MALLOY: Yes. It was December 25th, 1958.

THE COURT: Who was that?

MR. MALLOY: Carol Bailey, the brother.

THE COURT: Do you want to stipulate his death?

If not, you can offer the death certificate.

MR. MALLOY: Then one other thing. Mr. Fisher testified that they were afraid, he or Mrs. Lester, I am not sure just how he did say it, but in any event he says that they would destroy the will if he hadn't taken it over to Virginia; and I wanted to introduce the section of the Code which makes that a criminal offense.

THE COURT: No, you can't introduce a statute in evidence. That doesn't go to the jury and the Court takes judicial notice of the statutes.

MR. POSTON: I have no objection to the death certificate. I don't see the relevancy, but I don't object.

THE COURT: I will allow it, unless you want to stipulate the date.

[446] MR. POSTON: I will stipulate.

(In Open Court:)

MR. MALLOY: We have stipulated, if Your Honor please, that Carol Bailey, a brother of the deceased Emma O. Lester, died on December 25th, 1958.

THE COURT: Very well. Is there anything further?

MR. MALLOY: That is all.

THE COURT: Do both sides rest?

MR. POSTON: Your Honor, may we approach the bench one more time?

THE COURT: Yes, indeed.

(At the Bench:)

MR. POSTON: Your Honor, the witness that we had who was going to identify this picture was sick and couldn't come. I wondered if Mr. Malloy would stipulate to it. I think the jury would be curious to see what she actually looks like.

MR. MALLOY: I object to that.

THE COURT: This is the dog?

MR. POSTON: And that is the dog and that is Mrs. Lester.

THE COURT: Who is this lady?

MR. POSTON: That is Mrs. Lester.

MR. MALLOY: I object.

[447] THE COURT: A nice looking dog. I am fond of Collies.

MR. POSTON: You won't stipulate?

MR. MALLOY: No, I object.

THE COURT: Suppose you offer it in evidence in open court.

MR. MALLOY: There isn't any date when it is or who took it or anything. There isn't anything on there to show when it was or any other thing.

THE COURT: If there is any objection and the date is not identified or the subject matter is not identified, of course I will sustain the objection.

MR. MALLOY: Well, I object.

THE COURT: I don't think it is very important what the dog looked like.

MR. POSTON: I will withdraw the offer. I will withdraw the picture as far as the evidence is concerned.

THE COURT: Are you offering it or withdrawing it?

MR. POSTON: I am withdrawing it, then.

I do want to make motions.

THE COURT: I know. I will excuse the jury.

(In Open Court:)

THE COURT: Do both sides rest?

[448] MR. POSTON: Yes, Your Honor.

MR. MALLOY: Yes, Your Honor.

THE COURT: Ladies and gentlemen of the jury, we are going to take up a few matters now for which your presence and cooperation will not be needed, so that you may retire to the jury room and be at ease until we are ready to resume proceedings in your presence.

(The jury retired to the jury room.)

THE COURT: Now the jury having retired to the jury room, the Court will hear any motions.

MR. POSTON: Your Honor, at this time I should like to renew my motions for a directed verdict as to these issues in the case. I feel that --

THE COURT: I don't think you can have a directed verdict generally. There are certain issues that have to be tried separately and I think the best mode of proceeding is to take up the separate issues.

MR. POSTON: That is what I was about to do, Your Honor.

THE COURT: Very well.

MR. POSTON: The first issue involved is the due execution of the will.

I feel that the plaintiff has put on his prima [449] facie case as far as due execution of the will. He has proved that the will was witnessed by two competent witnesses; that it was signed by the testatrix in the presence of these two witnesses and that they signed in the presence of the testatrix; that she acknowledged the will to be her will.

THE COURT: Yes, I remember -- no, there is no testimony that she actually acknowledged the will.

MR. POSTON: She said, I want you to witness my will.

THE COURT: Exactly.

MR. POSTON: Now, the cases -- I know Your Honor was troubled somewhat about publication when we had our bench conference previously on this motion. I have researched the cases on this and no doubt Your Honor has by this time, too.

THE COURT: No, I haven't. After all, the Court has a right to expect counsel to do the research and present cases in support. At least, that is what we used to do in my early days at the bar when I was in private practice.

MR. POSTON: Well, I found three cases in the District of Columbia on publication and they all indicate that no publication is required in the District of Columbia.

THE COURT: What are the cases?

MR. POSTON: In the case of In Re Porter's Will, [450] which is 20 D.C. 493 --

THE COURT: That is the old District of Columbia --

MR. POSTON: It's a very old case. It held in that case it is not necessary to the validity of a will that the witnesses should know the nature of the instrument they are signing.

Now I have got two others, Your Honor.

THE COURT: Give me the citations to the others before you discuss them so I can send for the books.

MR. POSTON: Notes vs. Doyle, 32 App. D.C. 413. The other case is Peters vs. Peters, 64 App. D.C. 331, 78 F.2d 215.

THE COURT: Now I will hear you further about those cases.

MR. POSTON: The case of Notes vs. Doyle held witnesses to a will need not know the document they have witnessed as a will.

The case of Peters vs. Peters held, in proceedings for a contest of a will, the alleged failure of the deceased to declare that writing as his

will held not to be fatal where evidence showed that attesting witnesses knew the paper subscribed by them was decedent's will.

Those are the only three cases that I know of in [451] the --

THE COURT: I notice, looking back in my notes, I have those citations even though I didn't look at them recently.

What do you say, Mr. Malloy?

MR. MALLOY: Well, if Your Honor please, in this case we have many peculiar angles. For instance, we haven't yet -- they haven't yet established who wrote this will. Now, you have here -- ordinarily it's drawn by a lawyer. You have a lawyer here named as executor in the will, yet he didn't draw it, didn't know anything about it until after the death of the party.

You have many mistakes, like testator instead of testatrix, and you have the --

THE COURT: No; the question is whether due execution of the will has been established. The two witnesses testified that they were requested by the deceased to witness her will. They saw her sign the document and then she handed it to each of them and they signed in her presence and in the presence of each other.

-So far as the formal execution is concerned isn't that sufficient? What do you say about that?

MR. MALLOY: I think that ordinarily that would be [452] sufficient. I think in this case the fact that she did fail to mention, as Your Honor has pointed out before, that this was her will, and in view of the fact that nobody knows who typed the will or how it got -- Mr. Fisher testified that she didn't type it, that she didn't have a typewriter, and that is the only question --

THE COURT: What does that have to do with the question of due execution?

MR. MALLOY: Well, with the question of due execution, of course, it has to do with saying whether or not these two parties who signed it, one is the daughter and the other is the son-in-law of the party.

Now, of course, they say that they signed this paper, although she said she didn't read it and they didn't see it, but Fisher did know all about it, he knew everything about it except who typed it. And that was the only reason why I thought that Your Honor might have in mind, in other words, that they -- in order to be fair about the matter, that they had a right to disclose everything about it.

THE COURT: But neither Mr. Poston nor Mr. Simmons know who typed the will and the Court has no reason to question their statements and I presume you don't question that.

MR. MALLOY: No, sir, just merely a matter of [453] argument on the basis of that.

THE COURT: Do you wish to say anything in reply?

MR. POSTON: Nothing further on that issue, Your Honor. I want to make further motions on the other issues, but I presume the Court wants to take them one at a time.

(Pause.)

THE COURT: It is the accepted doctrine in the District of Columbia, dating back to the case of the will of Admiral David D. Porter of Civil War fame, 9 Mackey 493, 503, that the execution of a will is sufficiently proved if it appears that each of the witnesses saw the testator sign the instrument, or has heard him, after it has been signed, acknowledge that the act was his. The acknowledgement may be conveyed either by words or by acts which indicate to the witness that he is called upon to act in the capacity of witness, and to attest something which is treated by the testator as his act. It is not necessary that the witness should know the nature of the instrument produced and submitted for his attestation.

In *Notes v. Doyle*, 32 App. D.C. 413, in an opinion by Mr. Justice Van Norsdel, the same doctrine was repeated. It was stated the subscribing witnesses to a will need not know the contents of the document, they may attest it [454] without the presence of each other, they need not see the testator sign the will, provided that he acknowledges

signature to each of the witnesses, and they need not even know that the document they had witnessed is a will.

The latest opinion on the point is one by Judge Groner, Peters v. Peters, 64 App. D.C. 331, in which he, after citing the two cases to which this Court has just referred, stated that in construing the District of Columbia statute it is not necessary to the effectiveness of the acknowledgement or the attestation that the witness know the nature of the instrument produced and submitted for his attestation.

Now the testimony here is, on the part of each of the attesting witnesses, as well as on the part of Mr. Fisher, that the testatrix requested the two witnesses to witness her will and that she signed it in their presence.

This is sufficient acknowledgement of the will, even though it is not acknowledged in so many words. Under the cases just cited that is sufficient. Each of the witnesses knew that the document was a will, even though that was not indispensable. They admit they did not know its contents and they did not have to.

Now, if the jury accepts that testimony it would [455] have to answer question one, as to whether the will was executed and attested in due form as required by law, in the affirmative. However, the Court is of the opinion the question should be left to the jury and that the motion for a directed verdict should be denied because of the fact that the two attesting witnesses, though they are not legatees, are not strictly disinterested witnesses because the father of one and the father-in-law of the other is the principal beneficiary. I think under those circumstances the Court should not direct a verdict but should leave the matter to the jury.

Accordingly, I will deny the motion for directed verdict on issue number one.

Now what is next?

MR. POSTON: On issue number two, was the said Emma O. Lester at the time of making and subscribing or of the acknowledging by

her of the said paper writing, of sound and disposing mind and capable of executing a valid deed or contract, I move for a directed verdict that she was.

THE COURT: I am going to deny that motion. I think on the basis of Dr. Shapiro's testimony it is incumbent upon the Court to submit this issue to the jury.

MR. POSTON: My next motion is a motion for a [456] directed verdict with regard to issue number three, which is as follows: was the said paper writing dated the first day of July 1965 obtained or the execution thereof procured from the said Emma O. Lester, deceased, by fraud or deceit practiced upon the said Emma O. Lester by Raymond Leon Fisher or some other unknown person or persons?

THE COURT: Mr. Malloy, what do you say about that? At first blush it appears to me that there is no evidence justifying the submission of fraud to the jury. However, this is only my tentative reaction and I shall be glad to hear you.

MR. MALLOY: I understand, Your Honor. I think, if Your Honor please, we have here a situation where the cases, and especially the case of Duckett v. Duckett in 77 U.S. App. D.C. where they say that --

THE COURT: No, suppose you get away from the cases first. I read the Duckett case just the other day; I don't see how it helps you. Just what do you claim the fraud is?

You know, fraud is entirely different from undue influence. I don't find that the cases hold or intimate that there is no distinction between the two. Undue influence, of course, can only be proven, in most cases, by circumstantial evidence. But when you say fraud, some specific fraud has to [457] be charged, like a misrepresentation or, for example, in one or two cases, keeping members of the family away from the deceased, and so on. There has to be some act amounting to misrepresentation or fraud of other type.

MR. MALLOY: Now that is why I say in the situation these parties have testified --

THE COURT: You may review the testimony afterwards, but first I want you to tell me what you charge is the fraud.

MR. MALLOY: That is why I say these parties testified --

THE COURT: Don't tell me what they testified. I want to know first what you charge the fraud consisted of. You have got to pinpoint things.

MR. MALLOY: That is what I am trying to do.

THE COURT: Don't tell me what the testimony was. You can tell me what the testimony was afterwards. First tell me what is your charge of fraud.

MR. MALLOY: The fraud is that Fisher, when he was going to dial the phone and to call these relatives about her condition or otherwise, that they had a false sense of security in that he was being paid to do this, so they had been informed by Mrs. Lester, and that as a result of that he [458] did not notify them. Now, in addition --

THE COURT: Notify them of what?

MR. MALLOY: Of her condition or of the fact -- and also another statement that he made to Mrs. Lester, according to Elsie Pinney's testimony, that he had told her that he did not think the family paid enough attention to her when, as a matter of fact, he had told Elsie Pinney, as she testified, when he took her over to the bus stop, that whenever he had any differences of opinion with Mrs. Lester he would stay away for a while until she -- knowing that she depended on him, because Mr. Simmons testified that she was his right arm. In other words, that she was absolutely dependent on him for everything that she --

THE COURT: But what specific fraud do you charge, Mr. Malloy? What is the fraud?

MR. MALLOY: The fraud is in procuring this will in his favor.

THE COURT: No, that is not fraud. Fraud must be some misrepresentation or some fraudulent act. We must distinguish between fraud and undue influence.

I think there is enough proof here to submit the issue of undue influence to the jury.

MR. MALLOY: May I read this with reference to [459] fraud:

"The term fraud usually connotes a sinister and furtive state of mind prompted by some ulterior purpose. The courts have refused to define it, however, and thus aid in the devising of new schemes to defraud, but will find it and strike it down in whatever form it takes. Fraud assumes so many different forms that the particular facts and circumstances in every case are of the greatest importance. Fraud may be either actual or constructive. Actual fraud involves the intent or purpose to deceive, while constructive fraud rests upon a legal presumption, but it is nonetheless fraud, however, although it rests on the relationship of the parties rather than actual deception or attempt to deceive. Constructive fraud may be proved by showing that one party to a transaction was in a special confidential or fiduciary relation to the other, giving him the opportunity to take advantage of or exercise influence over the latter. In this respect a fiduciary relationship is of course any relationship in which confidence is reposed. It may be moral, social, domestic or merely personal. It embraces both technical fiduciary relations such as guardian and ward, as well as those which exist whenever one man trusts in and relies on another. Fraud may consist of positive assertion of a fact which untrue, the creation of a false" --

THE COURT: What are you reading from Mr. Malloy? Are you reading from a case?

MR. MALLOY: Well, there was a combination of cases.

THE COURT: This is just your own summary?

MR. MALLOY: Yes, sir.

THE COURT: Well, I agree with that, but I still don't see what specific fraud -- fraud may take many forms, as you say, but there has to be something specific about it.

MR. MALLOY: Well, I think that the whole picture here is the same way on the undue influence.

In other words, in several of these cases in the Court of Appeals, in the Wiggins case they tie in the fraud and the undue influence as being similar, having in mind these things, that it may be actual or constructive. In other words, based on the whole picture.

THE COURT: Very well.

The Court is of the opinion that there is not sufficient evidence justifying the submission of the issue of [461] fraud to the jury.

Fraud must be distinguished from undue influence. While fraud may take many forms, there must be some evidence from which the jury would have a right to infer that some specific type of fraud was used, and there is no such evidence in this case.

Accordingly, the Court will direct a verdict for the caveatees on the third issue listed in the order framing issues, the issue of fraud.

Now, then, the fourth issue.

MR. POSTON: Your Honor, the fourth issue is, was the said paper writing dated the 1st day of July 1965 obtained --

THE COURT: I have it before me.

MR. POSTON: I would like to make a motion for a directed verdict on this issue and I would like to be heard at length on this, Your Honor.

THE COURT: I will hear you briefly.

MR. POSTON: This issue, Your Honor, troubles me in this respect: throughout these five days of testimony there has been reams and reams of testimony and there has been not one word of harm, not one word of derogation by these hostile witnesses, these embittered witnesses, against Raymond [462] Leon Fisher. The only thing that was said about him by Mr. Walter Bailey was that he had the highest respect for him, and this apparently did not change until after the death of Mrs. Lester and he found out he had been left only \$3,000 in the will.

The only thing that we have got here that the caveators can hang

their hat on as far as undue influence are these facts which they say are very, very material and important -- and which I don't agree -- and that is, there was a procurement by Raymond Fisher of the will form. This was readily admitted by Raymond Fisher. There is no other evidence but his admission to this.

This will form was made not at the time this will was executed, but two months prior to that and at the request of the testatrix.

THE COURT: Mr. Poston, you are making a jury argument to me. Undue influence can be proven by circumstantial evidence.

I think there are enough circumstances here which require me to leave that issue to the jury. You see, here we have a situation where the principal beneficiary supervised the execution of the will. Now, that may have been perfectly honest --

[463] MR. POSTON: But not the preparation, Your Honor.

THE COURT: That may have been perfectly honest, but on the other hand, it is certainly in questionable taste. He selected the witnesses and he selected his own daughter and her husband. He kept the will -- he was given the will and kept it in his possession without revealing that fact to the family until the death of the deceased.

Now, it may all have been honest, but I think it is for the jury to say that and not for the Court.

I think I have to leave the issue of undue influence to the jury, especially in the light of the authorities which indicate that undue influence may be inferred from the surrounding circumstances.

But there is one matter on which I will be glad to hear Mr. Malloy. The fourth issue refers to undue influence and I think that ought to be left to the jury, but it also includes duress or coercion. I see no evidence of duress or coercion and I am inclined to leave to the jury only the issue of undue influence.

What do you say about that, Mr. Malloy?

MR. MALLOY: I think, if Your Honor please, they always are joined together in it, and that comes to the point where when Mr. Fish-

er said, knowing that he was her right arm, [464] when he says that he would stay away, and his wife also indicated that she came to them then — in other words, he, knowing that Mrs. Lester was absolutely dependent upon him and that when he then would have any friction with her, he would stay away, knowing full well that she needed him, I think that that could well be considered duress or coercion on his part.

THE COURT: No, that might be undue influence, but it wouldn't be duress or coercion.

I will modify the fourth issue by striking out the words "or duress or coercion," and I shall leave to the jury the issue of undue influence.

MR. POSTON: Your Honor, I would like to make one observation concerning this matter of the relationship between Mrs. Lester and Mr. Fisher. I don't think that there has been an establishment of a confidential relationship.

THE COURT: It doesn't make any difference. There are enough circumstances to submit this matter to the jury. It is going to be submitted to the jury, Mr. Poston.

MR. POSTON: Thank you.

THE COURT: Now, I think the fifth question is just a summary of the other verdicts and I think it would be confusing to submit that to the jury.

[465] MR. MALLOY: You think what, Your Honor?

THE COURT: Issue number five, I think that is just a conclusion to be drawn from the answers to the other questions and it would be confusing to submit it to the jury.

MR. MALLOY: I think, Your Honor please, that is the important one because --

THE COURT: No, I shall decide it on the basis of the answers to the questions because if the jury should hold that there is undue influence or it should hold there is lack of mental capacity, then I shall render judgment setting aside the will. On the other hand, if they hold that there was due execution, they find that there was due execution, there

was mental capacity, no undue influence, then I shall direct judgment in support of the will. That is the way it will be. Number five is a conclusion of law.

I think after July 1st, when the new rules go into effect in probate proceedings, we are going to do away with this order of framing issues.

MR. MALLOY: I quite agree with Your Honor that after July it will be true, but at the present time it isn't the law and there are --

THE COURT: I hereby amend the order by striking out number five.

[466] MR. MALLOY: Your Honor will allow us an exception.

THE COURT: Now, gentlemen, how much time do you wish for summing up?

MR. POSTON: I think an hour, Your Honor.

THE COURT: And you, Mr. Malloy?

MR. MALLOY: I was wondering one thing --

THE COURT: How long would you like for summing up?

MR. MALLOY: I should say an hour would certainly be ample.

THE COURT: Suppose we allow an hour a side, but just bear in mind, gentlemen, that there is no rule of law requiring counsel to exhaust their maximum time.

MR. MALLOY: May I say one thing?

THE COURT: Yes, indeed.

MR. MALLOY: With reference to the matter of the right to open and close, since we have the burden of proof on the issues of undue influence and testamentary capacity, if we shouldn't have the right to open and close in the argument to the jury since the burden will be upon us.

THE COURT: Here is the situation, Mr. Malloy. I would be inclined to let you open and close if it weren't for the first issue, namely, due execution. But you are questioning due execution. On the issue of due execution the [467] proponents have the burden of proof. Now, if you were to concede due execution, that would be a different matter; but since in the light of your objection I denied the motion for directed

verdict on the issue of due execution, I shall instruct the jury on due execution the proponents have the burden of proof.

On the issue of mental capacity and undue influence the caveators have the burden of proof.

That being so, we will just have to let Mr. Poston open and close.

MR. MALLOY: Well, then, under those circumstances, if Your Honor please, it's a close question and there is a legal question as to whether or not, although it is the daughter and the son-in-law, and under those circumstances I would prefer to have Your Honor withdraw our objection to the first, to have the right to open and close.

THE COURT: In other words, you withdraw your objection to my denial of the motion for directed verdict on the first issue? You withdraw your objection to that?

MR. MALLOY: How was Your Honor going to charge the jury on that? Did Your Honor have in mind how you were going to charge the jury on that?

THE COURT: Mr. Malloy, Mr. Poston made a motion [468] for a directed verdict on the first issue, which is the issue of due execution. You objected to that. I sustained your objection and denied Mr. Poston's motion for a directed verdict on that issue. That being so, I shall have to leave that issue to the jury, and if I leave it to the jury, I shall, of course, instruct the jury that the burden of proof is on the proponents of the will.

When I come to instructing the jury as to the other two issues, I shall instruct the jury that the burden of proof is on the caveators.

Well, now, we will take our usual mid-morning recess at this time and you may think this matter over during the recess.

(Recess.)

THE COURT: Gentlemen, before we proceed, I want to make a few observations.

I am frankly appalled by the thought that any counsel, any member of the bar should feel that there is a substantial advantage in the right

to open and close. In other words, I hate to think that any member of the bar would think that he can win a case by having the right to open and close and would lose the case if the other side opens and closes, because if I thought that that made that much difference [469] I would lose my faith in the jury system immediately and I would be a strong advocate in championing down the length and breadth of the land abolishing the jury system. To think that the jury's verdict could be affected by who speaks first and who speaks last I think is appalling.

Now I will hear you, Mr. Malloy.

MR. MALLOY: Well, if Your Honor please, I have this worry with it: I have endeavored to try the case having in mind, as Your Honor suggested, I think, that there is, after all, a Court of Appeals. So in trying a case you try to avoid any possibility of --

THE COURT: Mr. Malloy, you don't have to serve a notice of appeal on me.

MR. MALLOY: Oh, no, I merely say that is what is in my mind, not the point that Your Honor says about influencing the jury by talking twice. In other words, that the cases --

THE COURT: What I meant was this, that I am surprised that any lawyer can think that he can win a case or might lose a case according to which lawyer speaks first and which lawyer speaks last. Juries aren't influenced quite so easily. There is an old case in which Judge Learned Hand wrote the opinion in which he says something to the effect that juries are not like leaves in the trees swayed by every wind.

[470] Now just what is your application to the Court, Mr. Malloy?

MR. MALLOY: If Your Honor please, I would prefer that there be no possibility of appeal in the matter in the event we should win the case. In view of the cases which Your Honor has read, and I frankly didn't have it until Your Honor read the cases which Mr. Poston cited, there is a doubt in my mind from the language in those cases as to whether or not if it is left to the jury on that, and the cases seem to be a question of law, as to whether or not we shouldn't in the interest of

the matter of looking at it from the standpoint of these caveators, who are 79, the oldest, and the youngest 74, and that was why I thought that under those circumstances we would be better off by submitting to the jury the two issues of the testamentary capacity and the undue influence.

It was my thought that fraud and the duress and deceit, coercion, should be included, but Your Honor has already ruled on that.

So I think under the circumstances, considering their age, that we would be on safer ground by not having that question submitted to the jury.

THE COURT: You mean the question of due execution?

MR. MALLOY: That is right, sir.

[471] THE COURT: I want to be sure there is no mistake in my mind. Are you withdrawing your objection to the motion for a directed verdict on the first issue, namely, the issue of due execution?

MR. MALLOY: Yes, sir.

THE COURT: Well, then the Court will grant the motion of the proponents for a directed verdict on issue number one, due execution.

That will leave to the jury the issue, first, of mental capacity, and second, undue influence. On that issue the caveators have the burden of proof. You admit that. Under those circumstances, I think the orderly method of procedure, although I don't think it is of particular importance, but I think the orderly method of procedure would be for Mr. Malloy to open and then Mr. Poston to proceed and Mr. Malloy to close.

Is there any objection to that?

MR. POSTON: No objection, Your Honor.

THE COURT: As has been said, we will allow each side a maximum of one hour. How would you like to divide your time, Mr. Malloy?

MR. MALLOY: I think either half and half.

THE COURT: Very well. Before we bring in the [472] jury there is one thing more. Are there any requests for instructions?

MR. POSTON: Yes, Your Honor.

THE COURT: I will take them up now. Have you given a copy to Mr. Malloy?

MR. POSTON: Yes, Your Honor.

THE COURT: That is an awful lot.

MR. POSTON: Your Honor, I might point out that I went through an old case of Judge Pine and these are ones that he granted, but I still hesitate because the caveatee lost in that case. Judge Pine granted those instructions in a similar case. I say I hesitate because the caveatee lost in that case, but I think they are fair.

THE COURT: I don't like a whole lot of requests for instructions because I always instruct the jury in my own phraseology. I think the usefulness of requests for instructions -- and they are very useful -- is to bring to the Court's attention some specific point involved in the case.

I will grant this in substance, but I never use counsel's language. I will grant No. 1 in substance.

No. 2 I shall grant in my own language.

I will grant No. 3. I am not going to use this language, however.

[473] MR. POSTON: Granted in substance, I understand, Your Honor.

THE COURT: I am going to deny No. 4.

MR. POSTON: May I note my exception, Your Honor.

THE COURT: I am going to deny No. 5 because that is argumentative. I am going to define what constitutes mental capacity.

MR. POSTON: Exception, Your Honor.

THE COURT: I am going to deny No. 6 because I am going to cover the matter in a different way.

MR. POSTON: Exception, Your Honor.

THE COURT: I am going to deny No. 7. I am going to cover it in a different way.

MR. POSTON: Exception, Your Honor.

THE COURT: I am going to deny No. 8 because it is repetitious. That has been covered in another request.

MR. POSTON: Exception, Your Honor.

THE COURT: No. 9 I shall grant in my own way.

I am going to discuss expert witnesses, but I am not going to do it in the way in which you request in No. 11.

MR. POSTON: Exception, Your Honor.

THE COURT: The same as to No. 12.

Now you understand that I do not permit requests [474] for instructions to be read to the jury by counsel and I don't expect counsel to predict or prognosticate to the jury what the Court will instruct.

MR. POSTON: I understand, Your Honor.

THE COURT: Do you have any requests for instructions?

MR. MALLOY: I assume that Your Honor would, from past experience, say testamentary capacity and undue influence, and Your Honor knows it very well.

THE COURT: I want to say this, gentlemen, that I regard requests for instructions as perfectly useless and just an additional burden on the Court except when they are limited to some specific point in the case, because you have to assume that the Judge is reasonably qualified by knowing some of the basic and elementary principles and I think it is just a burden on the Court to submit requests for instructions on elementary principles.

Well, are you ready to proceed, or is there anything else to be taken up before we bring in the jury?

You may bring in the jury.

I hope we can finish summing up, and I think we can, this afternoon. Even if we finish before the close of the day I won't instruct the jury until tomorrow morning [475] because I don't want to send them out at four o'clock.

(The jury resumed the jury box.)

(Closing arguments were made by counsel for both sides.)

THE COURT: Ladies and gentlemen of the jury, you will be excused at this time until 10 o'clock tomorrow morning. At that time the Court will give you its instructions and after you receive the instructions of the Court you will retire to deliberate and reach a verdict.

Overnight please don't start discussing this case, don't discuss it with anybody, not even at home with members of your families, and don't discuss it amongst yourselves. Don't let anybody speak to you about, as I said on a prior occasion, and if anyone should try to you must report the matter to the Court.

You will be excused at this time and please be back in the courtroom a few minutes before ten o'clock tomorrow morning.

(At 3:15 p.m. trial stood in recess, to reconvene 10:00 a.m., March 23, 1966.)

[477] THE COURT: We will proceed with the case on trial.

You may bring in the jury.

(The jury resumed the jury box.)

#### JURY CHARGE

THE COURT: Ladies and gentlemen of the jury:

The trial of this case has taken quite a little time, but that was inevitable and unavoidable because this is the kind of a case where a great many individual and separate details have to be introduced, like pieces in a jigsaw puzzle, and that takes a considerable consumption of time and it is a laborious and difficult task for counsel, and counsel on both sides have performed it very creditably and very ably.

It is my information that a number of you are participating in your first trial at this term of court. For that reason before undertaking a discussion of the case on trial I shall discuss very briefly and summarize very briefly for you your duties and my duties in respect to yours. Some of you who have participated in other trials have already come to know them and perhaps it may seem needless repetition to them, but in view of the fact that some of you have not participated in other trials at

this term of court I feel it is incumbent upon me to make these observations.

[478] Under the system of jury trials that prevails in the Federal courts it is the function of the Court, that is, it is my function and my duty to instruct the jury concerning the rules of law that must govern the disposition of the case on trial. You ladies and gentlemen of the jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence, and solely on the basis of the evidence, introduced at this trial; and then having found the facts, it is your function to apply to them the rules of law that I shall discuss.

In addition to instructing the jury as to the law the Court has a further function to perform, namely, to summarize, discuss and comment on the facts and on the evidence to the extent to which it appears to the Court desirable to do so. This is done, however, solely in order to aid and assist the jury in arriving at its conclusions on the facts. The Court's summary, discussion and comments on the facts and on the evidence are not binding on you, they are intended only to help you, and you need attach to them only such [479] weight as you deem wise and proper. If your understanding or your recollection on your view of the evidence in any respect differs from mine, then it is your understanding, your recollection and your view of the evidence that must prevail because, I repeat, the final decision on the facts is solely within your province. The jury, so to speak, are the sovereigns when it comes to decision on the facts. My instructions are binding on you only as concerns the law.

With these preliminary remarks I am ready to enter into a discussion of the case on trial.

This case, as you know, of course, involves the validity of the will

of Emma O. Lester. This will is dated July 1st, 1965. She died on September 1st, 1965.

At the time of the execution of her will and of her death Emma O. Lester was 81 years old. She had two sisters and one brother whose ages ranged in the seventies. The names of the sisters and brother were Marie Bailey, Elsie Pinney and Walter Bailey.

The testimony shows that she left an estate of approximately \$70,000. By the will that is involved in this proceeding she left \$3,000 to her brother Walter Bailey, \$3,000 to her sister Elsie Pinney, and \$1 to her sister Marie Bailey. She left \$3,000 to her nephew Raymond Bailey. She [480] also left \$500 to her neighbors Mr. and Mrs. Burdette, \$100 to Father Flanagan's Boys Town, \$100 to Aspen Hill Cemetery.

She left the rest of her property to a friend, Raymond Leon Fisher. She stipulated in the will that he should retain her real property at Deale Beach, Maryland for the enjoyment of her dog Laddie during the dog's lifetime.

The will names as executor a member of the bar of the District of Columbia, Mr. J. Benjamin Simmons. The executor named in the will, as is his duty, filed the will and a petition for the probate of the will.

The sisters and the brother are contesting the probate of the will. They filed what the law calls a caveat, which is a technical name for objections to the probate of the will. They assert that at the time the will was executed the testatrix, that is, Emma Lester, was mentally incompetent and also that the will was procured by undue influence.

Although there has been a great deal of testimony introduced, actually, the case is not a complicated one. You will have two questions to decide and I will try to organize the testimony insofar as I can in order to assist you in simplifying the case and reducing it to its simplest terms.

The two questions that you will have to decide [481] are: First, whether Emma Lester had mental capacity to execute this will as of the date on which it was executed, or as the law says, whether she was of sound and disposing mind. The second question that you will have to

decide is whether the execution of the will was procured by the undue influence of Raymond L. Fisher, who gets the bulk of the property under it, or by anyone else.

You must concentrate your attention on these two questions. First, was Emma Lester mentally capable of executing the will. Second, was the will procured by undue influence.

If she was mentally incompetent to execute the will the Court will set it aside. If the will was procured by undue influence the Court will likewise set it aside.

On the other hand, if you find that Emma Lester was mentally competent and that the will was not procured by undue influence, then the Court will make a decree probating, that is, upholding the will.

You are not concerned with the justice of the will, with the desirability of the disposition or the fairness of the disposition made by the testatrix. You are only concerned with these two questions. Everything else is extraneous and should be set to one side.

Any discussion that you may have heard in the [482] courtroom between Court and counsel also do not concern the function that you have to perform and you should disregard them.

You must arrive at your conclusion calmly and deliberately, fairly and impartially, without any feeling or emotion, without any sympathy for anyone, without any anger at anyone, or any other feeling or emotion. Your decision must be based solely on the evidence and on the facts as you find them to be.

You must not be swayed by oratory or influenced by eloquence, but you must be guided solely by matters that appeal to your intellect.

As I said to you before, the next of kin, that is, the sisters and the brother, are objecting to the probate of this will and claim that the testatrix, the deceased, was mentally incompetent to execute the will, and second, on the ground that it was procured by undue influence. Each of these two questions have to be considered separately and you will answer them separately.

The burden of proof is on the parties objecting to the probate of the will to establish their objections by a fair preponderance of the evidence. In other words, the burden is not on the executor to establish that the testatrix [483] was mentally competent or that the will was not procured by undue influence. The burden of proof is on the parties objecting to the probate of the will to establish either that the testatrix was mentally incompetent, or, second, that the will was procured by undue influence. This burden of proof must be sustained by a fair preponderance of the evidence.

What is meant by the words fair preponderance of the evidence? In order that you may find a verdict in favor of the parties objecting to the will you must be reasonably satisfied that their objections are true. This requirement, of course, does not mean that the objectors must produce a greater number of witnesses than the executor, but as I have just stated, merely that you must be reasonably satisfied of the truth of the objections.

Let me state the same thought in a somewhat different way. Preponderance of the evidence means evidence of greater convincing force. The function of the jury is to weigh the evidence carefully, as though in a pair of scales, and to find a verdict for the party in whose favor the evidence preponderates, in whose favor, that is, the scale goes down. If on any issue the evidence is evenly balanced, then the verdict must be against the objectors, that issue must be determined against the objectors and in favor of the executor.

[484] In determining the issues of fact to be submitted to you for decision you will consider and weigh the testimony of all of the witnesses who have testified at this trial, all of the documents that have been introduced in evidence, as well as all the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony and in a case such as this circumstances may be of great weight.

You are the sole judges of the credibility of witnesses. By that is meant that it is for you, and for you alone, to decide whether to believe any witness, the extent to which any witness should be credited and the weight that should be attached to the testimony of any witness. In case of a conflict in the evidence -- and there is a great deal of conflict in this case -- it is the function of the jury to resolve the conflict and to determine where the truth lies and what the fact was. In case more than one inference can be reasonably drawn from some item of evidence it is the function of the jury to determine what inference to draw.

In determining whether to believe any witness and in deciding what weight to attach to the testimony of any witness you have a right to consider any matter that may seem to you to have a bearing on the question. For instance, you [485] have a right to consider the attitude and the demeanor of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truthful individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness had sufficient opportunity for observing the matters concerning which he testified, whether the witness has made any contradictory statements, whether the witness had any motive for not telling the truth, whether the witness had any interest in the outcome of this case. All of these matters as well as any other factors that may seem to you to have a bearing on the question you have a right to consider in determining what weight to attach to the testimony of any witness.

If you should find that any witness deliberately testified falsely as to any material fact concerning which that witness could not reasonably have been mistaken, then you may, if you see fit to do so, disregard the entire testimony of that witness or any part of that witness' testimony.

This brings me to a more intensive and detailed consideration of the specific issues involved in this case and I shall discuss each of the two issues separately.

You will be handed two questions in writing, which you will answer

in writing. The first question is: Was Emma [486] O. Lester at the time of the execution of her alleged will dated July 1st, 1965, of sound and disposing mind and capable of executing a valid deed or contract? That, of course, deals with the first objection, namely, mental capacity.

The law is that in order that a will may be valid the person making it must be of sound and disposing mind when the will is executed. The law provides that no will shall be good and effectual unless the person making it shall be, at the time of executing or acknowledging it, of sound and disposing mind and capable of executing a valid will or contract.

Now, then, what is a sound and disposing mind for the purpose of making a will? If the party making the will possesses memory and mind enough to know and understand what property she owns and desires to dispose of, what persons are the natural objects of her bounty, and the person or persons to whom she intends to give it, and the manner in which she wishes it applied by such person, and generally if she fully understands her purposes and the business she is engaged in in so disposing of her property, she is in contemplation of law of sound and disposing mind.

The right of making a will and disposing of one's property as one pleases, even to gratify partialities or [487] prejudices and even to the exclusion of those close blood relations, this right is among the dearest and most sacred rights of a citizen known to the law. The right to dispose of one's property as one chooses, whether fairly or unfairly, whether reasonably or unreasonably, is not to be impaired or nullified except upon the most substantial ground.

To make a valid will it is not necessary that the person making it should be endowed with a high order of intellect or even an intellect measuring up to the ordinary standards of mankind, nor is it necessary to the making of a valid will that the party should have a perfect memory or that the person's mind should be wholly unimpaired by age, sickness or other infirmity.

Mere eccentricities do not justify setting aside a will on the ground of mental incapacity. A person may be eccentric, opinionated or peculiar, and yet may be shrewd and competent in conducting his own affairs and therefore capable of disposing of his property.

Mere eccentricities, prejudices, or resentment, without more, cannot invalidate a will. They may, indeed, be taken and considered in connection with all the other evidence, if any, bearing upon mental capacity.

As I said before, the question is, does the person [488] fully understand what she is doing, does she possess memory and mind enough to know what property she owns and desires to dispose of, who are the natural objects of her bounty, and the person or persons to whom she intends to give it, and generally fully understands her purposes and the business she is engaged in. If she does, then she is of sound and disposing mind.

On the other hand, if she does not fully understand what she is doing, she does not know what property she owns or desires to dispose of, if she does not know who are the natural objects of her bounty, or the person or persons to whom she intends to give it, why, then she would not be of sound and disposing mind.

Now I shall review and summarize very briefly some of the salient features of the evidence on this aspect of the case, and I want to repeat to you what I said at the opening of my remarks, what I say about the evidence, my summary of it and my discussion of it is intended only to help you, it is not binding on you. I may omit some items of evidence that you may consider important, I may perhaps mention some that you consider insignificant. The decision on the facts is your function, your duty and your responsibility.

Evidence was introduced concerning numerous items, [489] perhaps small in themselves, but, which it is claimed paint an entire picture. Evidence was introduced tending to show that the home of the deceased was unduly cluttered up, although other evidence was intro-

duced disputing this. Evidence was introduced that in her later years the deceased became slovenly and dirty in her personal appearance; other evidence was introduced denying this. Evidence was introduced to the effect that she had an unusually hot temper and was quarrelsome and quickly flared up and that she used profanity to excess, that on one occasion many years previous to her death she attacked her own father so that it was necessary to separate them.

Evidence was introduced, and not disputed, to the effect that she refused to speak to her own sister, Marie, for over ten years prior to her death because of some difference that had arisen between them over a decade ago.

Evidence was introduced to the effect that the conversation of the deceased was at times rambling and difficult to follow. On the other hand, evidence was introduced by other witnesses who testified that her conversation was sensible, coherent and reasonable.

All these matters are for you to consider, to sift them out and to determine what the fact was.

[490] A number of witnesses expressed opinions as to whether or not the deceased on July 1st, 1965 had a sound and disposing mind, namely, whether she was mentally competent. The next of kin, who are objecting to the probate of the will, all expressed opinions to the effect that she was not mentally competent and similar opinions were expressed by other members of the family, the family of the persons objecting to the probate of the will. On the other hand, the witnesses to the will, Mr. Fisher, the principal legatee, and other persons associated with him, expressed the opinion that she was mentally competent.

Several neighbors were called who knew the testatrix well by reason of the fact that they were neighbors and friends. Several of them were absolutely disinterested, that is, they obviously had no interest, direct or indirect, in the outcome of this proceeding. These neighbors all expressed the opinion that the deceased was mentally competent and mentally alert as of the time when the will was executed.

The will, I repeat, and as you have heard throughout the trial, was executed on July 1st, 1965. Evidence was introduced, and not disputed, that a little over three weeks later, on July 25th, she went out to the cemetery where her parents were buried and selected a headstone that she wanted [491] placed over her mother's grave and made a contract for that purpose. Some of the very witnesses who expressed the opinion that she was mentally incompetent to execute the will on July 1st expressed the view that she was competent to execute the contract for the headstone on July 25th.

It is for you to determine what effect to give to these circumstances and to this evidence.

Also, there was evidence introduced that only a week before her death she made a trip to Annapolis to see about taxes on real property that she owned.

Now the objectors to the probate of the will called an expert witness, a psychiatrist, Dr. Shapiro. Dr. Shapiro admittedly is an expert psychiatrist and a qualified psychiatrist. He had never seen Emma Lester, but he testified in response to what is known in the law as a hypothetical question, namely, the question summarized certain facts concerning Emma Lester and then asked the doctor's opinion whether on the basis of those facts he could state whether she was or was not of sound and disposing mind on July 1st, 1965. He expressed the opinion, on the basis of the facts contained in the question, as well as on the basis of the fact that the deceased died of what we laymen would call a stroke or series of strokes and that she had arteriosclerosis, [492] that she was not mentally competent on July 1st, 1965. Of course, you have to bear in mind that this opinion is based upon the facts stated in the question and some of these facts are disputed, and the validity of the opinion expressed by Dr. Shapiro depends entirely upon the truth of the facts upon which he bases it.

But beyond that, an expert witness such as a psychiatrist is called merely to aid and assist the jury. His opinion should be weighed and

considered by you in connection with all the other evidence in the case. You are not bound, however, to accept the opinion of an expert exclusively. You should give it only such weight as you find it to be entitled to. You have a right to find the facts to be contrary to his opinion if you disagree with it. The final decision must be yours, and while in making this decision you should consider and weigh the opinion of an expert, you are not bound by it. Otherwise, we would have a trial by experts instead of a trial by jury. Our law contemplates that the final decision on the facts must be by the jury and the jury is not bound to accept the opinions of anyone if it disagrees with them.

So much for the first question that you will have to answer.

You should take up the two questions separately [493] and consider them separately.

The second question that you will have to answer is, was the execution of the alleged will of Emma O. Lester, dated July 1st, 1965, procured by the undue influence of Raymond L. Fisher or some other person or persons? And your answer again should be yes or no.

Now what is undue influence? By undue influence is meant such influence that is exerted by improper practices to the extent that the mind of the person making the will is overcome and his free agency is destroyed and the will expresses the intentions and desires of another person rather than of the person making the will.

However, influence gained by kindness and affection will not be regarded as undue influence if no imposition or fraud is practiced, even though it may induce the testatrix to make an unequal or unjust disposition of her property in favor of those who may have contributed to her comfort, as against her own relatives, if such disposition is made voluntarily.

Confidential relations existing between the testatrix and the beneficiary do not alone furnish any presumption or inference of undue influence.

A person has the right to influence another [494] legitimately to make a will in his favor. He may lay his claim for preferment before the testatrix. These claims may be based on kinship, they may be based on friendship, they may be based on kindness, they may be based on service or need or on any other consideration. One has a right to use argument and persuasion, so long as it is fair and honest and does not to an oppressive degree become coercive.

Now, of course, undue influence cannot always be proven directly. It is not necessary that there should be direct proof of undue influence. Like any other fact, undue influence may be proven by circumstantial evidence. Undue influence is nearly always a matter of inference and, as I say, cannot be proven directly. Nevertheless, mere possibility or suspicion of undue influence is not enough. There must be some evidence, direct or circumstantial, from which an inference of undue influence can be justly drawn.

On this issue, I repeat, as on the issue of mental capacity, the burden of proof is on the next of kin who are objecting to the probate of the will to establish their contention by a fair preponderance of the evidence.

Now, then, let me summarize briefly the evidence that may bear pro and con on the question of undue influence, and again I repeat that my discussion of the evidence, as [495] distinguished from my discussion of the law, is intended only to help you, it is not binding on you. The final decision on the facts must be your own. That is your function, your duty and your responsibility.

Raymond L. Fisher, the principal beneficiary under the will, first became acquainted with the deceased when he came to Washington to work in the Government Printing Office. This was in 1939. The testimony is that he frequently and constantly performed various services for her over the years, such as driving her car, doing errands for her, helping her in her house from time to time, and cooperating with her

surviving brother in working on the property that the family owned at Deale Beach, Maryland, and so on.

The evidence is undisputed that Mr. Fisher saw her two or three times a week. He testified that in May 1965 she asked him to buy some blank forms for a will for her and that the same day he went to a law stationer's, purchased these blanks and brought them back to her. He testified that on July 1st, 1965 he was summoned to Mrs. Lester's home, that she told him that she wanted to execute her will and asked him to procure witnesses. And I might say, perhaps as you know, every will has to be witnessed by two witnesses. After some discussion he suggested that he would try to get his daughter and [496] her husband, which was acceptable to her according to his testimony. He then telephoned his daughter and asked her to come over and bring her husband to Mrs. Lester's home for the purpose of attending to some business matters. She got in touch with her husband, he drove over for her and the two of them then drove to Mrs. Lester's home. They were admitted to Mrs. Lester's home by Mr. Fisher, who had been there waiting for them, and brought them into the living room.

Testimony has been introduced to the effect that then Mrs. Lester told Mr. Fisher's daughter and son-in-law that she wanted them to witness her will. They testified that she signed the will in their presence and that each of them signed as a witness.

Mr. Fisher testified that then Mrs. Lester handed the will to him personally and asked him to keep it until after her death. He took it home, he testified, and kept it in a strongbox until Mrs. Lester died in September. He then delivered it to Mr. Simmons, who was named as executor in the will.

Now that is the testimony that has been introduced.

There is also testimony to the effect, and it is admitted by Mr. Fisher, that he never told the members of Mrs. Lester's family, that is, the brother and the two sisters, [497] that she had executed this will

or that he had it in his possession. His explanation is that Mrs. Lester has told him not to disclose the fact to the family.

Mr. Fisher admitted, in answer to questions, that he knew what was in the will at the time it was executed and the time that he had it in his possession. He said he did not type the will himself and he did not know who typed it, that it had been typed before he came to the house that day.

There is no evidence in the case as to who actually typed the will. That is a mystery, in a way. Obviously it is not written by a lawyer and no lawyer was present at the execution of the will. The will was apparently typed by a layman who is not too well educated. For instance, the address of Mrs. Lester is erroneously stated in the will. Whether that is of any significance or not is for you to determine.

Mr. Fisher testified that he did not influence or make any suggestions to Mrs. Lester as to how to leave her property and to whom to give it and also that he did not suggest the making of any will.

Evidence was introduced that back in 1953, when Mrs. Lester was about to go to the hospital for a major operation, she made a will and that in that will she left her [498] real property at Deale Beach, Maryland, to Mr. Fisher. The will, of course, has been destroyed, the prior will, so that we are dependent only on oral testimony as to what it contained, but that testimony has not been contradicted. The purpose of admitting that testimony was on the contention of Mr. Fisher, the principal beneficiary in the present will, that the present will was not just an afterthought but that the testatrix had the idea of leaving considerable property to Mr. Fisher for along time.

Now what weight should be attached to any of these circumstances is entirely for you to decide.

These two questions will be submitted to you in writing. You will answer each of them separately, yes or no, and your answers will be filled in by your foreman, who will likewise sign them. As of course you are aware, your verdict must be reached by unanimous vote.

Are there any suggestions or objections? If there are, you may come to the bench.

(At the Bench:)

THE COURT: I will hear you first because you opened and closed, Mr. Malloy.

MR. MALLOY: I think, if Your Honor please, that since in connection with the mental competence, that the fact [499] even though they did find that she wasn't mentally competent, they could take into consideration the mental condition in the undue influence. In other words, that that might have --

THE COURT: Just what do you request me to say? Point it up, please.

MR. MALLOY: That the mental condition, whether it was weak or otherwise, would be in connection with the undue influence, that it could be shown with it in the other circumstances in the undue influence.

THE COURT: I am separating the two issues. I think I shan't touch that.

MR. MALLOY: When you were speaking about the fraud you said if no imposition or fraud was practiced. I had contended, of course, that the fraud could also be shown --

THE COURT: What is your request, Mr. Malloy?

MR. MALLOY: In other words, they may find the fraud has been taken out of the situation with Your Honor's ruling. But you said that if no imposition or fraud was practiced --

THE COURT: You can't take one sentence out of context. I also said that undue influence must practically deprive her of her own volition.

You haven't yet told me just what you are requesting [500] me to do specifically.

MR. MALLOY: That was the thing. I thought that that should be deleted. But, however --

THE COURT: Very well. Have you anything, Mr. Poston?

MR. POSTON: Your Honor, I think the jury should be instructed that the residuary legatees are both Mr. and Mrs. Fisher. Both Mr.

and Mrs. Fisher are residuary legatees. You referred only to Mr. Fisher.

MR. SIMMONS: On the second page, Your Honor.

THE COURT: And his wife Evelyn. Yes, I will make that correction.

Have you anything else?

MR. POSTON: Your Honor, I think the jury should be instructed that the Court has ruled as a matter of law that there was due execution of the will.

MR. MALLOY: He has said that.

THE COURT: I only instruct them on what they have to do.

Anything else?

MR. POSTON: Since you commented on Dr. Shapiro's testimony shouldn't you comment also on Dr. Summerfield's testimony?

[501] THE COURT: No, because he didn't testify to anything. Otherwise, I would have. Besides which, Dr. Summerfield was a fact witness, he was not an expert witness.

MR. POSTON: Yes, I see. Thank you.

MR. MALLOY: I think, if Your Honor please, that the evidence in this case, Mr. Simmons' testimony that Fisher was her right hand and in view of all the other matters that have been brought out, that he was in the law in a --

THE COURT: What are you requesting me to do?

MR. MALLOY: In connection with that, that if you are going to say about the matter of Evelyn, his wife, that Fisher was in a confidential relationship with her and that that confidential relationship would carry over to any other member of the family.

THE COURT: I didn't say he was in a confidential relationship and I am not going to say it. All I said was that confidential relationship alone is not sufficient to give rise to an inference of fraud or undue influence.

MR. MALLOY: But I think that in this particular case it does come within definitely -- there isn't any question --

THE COURT: What are you asking me to do specifically?

MR. MALLOY: That you should state that --

[502] THE COURT: That he was in a confidential relationship?

MR. MALLOY: Yes.

THE COURT: I decline to do so.

(In Open Court:)

THE COURT: Ladies and gentlemen of the jury, I want to make a slight correction. I stated that the rest of the property was left to Raymond Leon Fisher. I should have said to Raymond Leon Fisher and his wife, Evelyn Fisher.

Ladies and gentlemen of the jury, the 12 regular jurors may now retire. Upon reaching the jury room you will select a foreman from amongst yourselves who will act as your chairman, preside over your deliberations, and after you have reached your verdict will fill in the answers to the questions which will be handed to you as you go out, and then speak for you in returning your verdict.

I suggest that you take up each of the two questions separately and after you dispose of the first question, then dispose of the second one.

The 12 regular jurors may now retire.

(At 11:06 a.m. the jury retired to deliberate.)

[503] 1:45 p.m.

THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: Mr. Foreman, the Court has received your note reading as follows:

"Please repeat the definition of undue influence and what constitutes a sound and disposing mind."

The Court will be glad to answer those two questions.

Undue influence is defined as follows: By undue influence is meant influence exerted by improper practices so that the mind of the person

making the will is overcome and his or her free agency is destroyed and the will expresses the intentions and desires of another person rather than of the person making the will.

On the other hand, influence gained by kindness and affection will not be regarded as undue if no imposition or fraud is practiced, even though it induces the testator to make an unequal or unjust disposition of his property in favor of those who have contributed to his comfort, if such disposition is voluntarily made.

Now so much for undue influence.

What constitutes a sound and disposing mind is this: If the party making the will possesses memory and mind [504] enough to know what property she owns and is desirous to dispose of, what persons are the natural objects of her bounty, and the person or persons to whom she intends to give her property, and the manner in which she wishes it applied to such persons, and generally if she fully understands her purposes and the business she is engaged in in so disposing of her property, she is in contemplation of law of sound and disposing mind.

Have I made this clear, Mr. Foreman?

THE FOREMAN: Yes, Your Honor.

THE COURT: Are there any other questions that either you or any other member of the jury would like to ask?

THE FOREMAN: No, I haven't, Your Honor.

THE COURT: You may retire to resume your deliberations.

(At 1:50 p.m. the jury retired to the jury room.)

[505] 4:00 p.m.

#### JURY VERDICT

THE DEPUTY CLERK: Will the foreman of the jury please stand.

(Juror No. 9 stood.)

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE DEPUTY CLERK: May I have it, please.

THE COURT: The Clerk will read the verdict.

THE DEPUTY CLERK: All jurors please stand.

Members of the jury, the document which I am about to read and is your verdict reads as follows:

Question No. 1 - Was Emma O. Lester at the time of the execution of her alleged will, dated July 1, 1965, of sound and disposing mind and capable of executing a valid deed or contract? Answer - Yes.

Question No. 2 - Was the execution of the alleged will of Emma O. Lester, dated July 1, 1965 procured by the undue influence of Raymond L. Fisher or some other person or persons? Answer - Yes.

And that is your verdict, so say you each and all.

Please be seated.

[506] MR. POSTON: I would like to have the jury polled, Your Honor.

THE COURT: Let the jury be polled. The Clerk will poll the jury.  
(The jury was polled by the Deputy Clerk.)

THE DEPUTY CLERK: Your Honor, the jury has been polled and the verdict is unanimous.

THE COURT: Ladies and gentlemen of the jury, the Clerk has announced your verdict and the Court wishes to thank you for the time and attention you have given to this case. You had a heavy responsibility in this case because it wasn't an easy matter to decide, but the Court feels that your verdict is well founded on both questions.

Now on the basis of the verdict of the jury the Court will sign a decree denying probate and you may submit the necessary papers through the office of the Register of Wills.

In order to make the record complete the Court will direct the answer no on the fifth issue, was the said paper writing filed in this Court and bearing date the 1st day of July 1965 the last will and testament of Emma O. Lester, deceased, because that is a conclusion from the other questions.

THE DEPUTY CLERK: Members of the jury, you are excused until Monday morning 9 o'clock.

[507] THE COURT: Mr. Malloy, will you prepare the necessary papers and submit them through the Register of Wills office.

MR. MALLOY: Yes, Your Honor, I will prepare the necessary order and I will give it to Mr. Poston for his approval and submit it.

THE COURT: I think both counsel can collaborate on preparing the necessary papers. Then they should be submitted through the Register of Wills office.

Of course, I think even though the will will be denied probate, counsel for the proponent is entitled to a fee out of the estate and I shall be glad to set a fee on an appropriate petition.

MR. MALLOY: Thank you, Your Honor.

(At 4:10 p.m. the trial stood concluded.)

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[Proceedings of May 3, 1966]

[2] THE DEPUTY CLERK: Estate of Emma O. Lester.

MR. POSTON: Your Honor, this is a motion for judgment NOW or in the alternative, a motion for a new trial.

The first ground of this motion is based on our position that the Court erred in failing to grant a directed verdict on the issue of undue influence.

THE COURT: It is not my practice to hear repetitious argument. If you have something new that you have not mentioned, I will be glad to hear you.

MR. POSTON: Your Honor, I would like to review the cases involving undue influence in the District of Columbia, those which I have cited in my memorandum of points and authorities --

THE COURT: You better tell me orally everything you want me to know because I don't pay any attention to points made in memoranda unless they are argued orally first or simultaneously.

Tell me briefly what your point is.

MR. POSTON: Your Honor, I don't believe I can tell you briefly. It will take a few minutes to tell you.

THE COURT: Well, you may take a few minutes and you can still be brief. You may assume that I have a very [3] vivid recollection of all of the evidence, so you don't have to review that.

MR. POSTON: I would like just to touch briefly on the evidence, if I may, your Honor. It will take me about a minute or a half a minute.

THE COURT: Proceed.

MR. POSTON: During the course of the trial, Your Honor, it was a long trial, it was a six day trial, there was an image built up of the testatrix, Emma O. Lester, of being a strong willed, arrogant, antagonistic, self-reliant woman. There was no evidence showing any domination, no attempt to dominate, no --

THE COURT: I am not going to hear a review of the evidence. You have argued it all before me before.

As a matter of fact, I almost intended to deny this motion without a hearing because frequently I do that, but if you have anything new that you didn't bring to my attention at the trial, I will be very glad to hear you.

MR. POSTON: Well, I will go directly into the cases, Your Honor, which I have set forth.

I think, Your Honor, the main thing which possibly hasn't been completely developed before Your Honor is the matter of whether or not there was a confidential or fiduciary [4] relationship between the testatrix --

THE COURT: I don't think there was, and I didn't deny your motion for a directed verdict on any theory there was a confidential relationship.

MR. POSTON: That is my main point. I think Your Honor felt there was no confidential relationship, no fiduciary relationship; yet the Court permitted this case to go to the jury on the presumption of undue influence.

There was no direct evidence of undue influence.

THE COURT: There very rarely is. And not a presumption, an inference from circumstantial evidence, which is entirely different.

MR. POSTON: Yes, Your Honor.

I would like to refer the Court -- and of course I know that Mersch is no authority, I mean we have to go to the cases involved, but in Section 745 of Mersch, where this matter is discussed at length, it says the following:

"A cayeator can establish basis for a presumption of undue influence only by proving three facts; namely" --

THE COURT: What are you reading from?

MR. POSTON: Section 745 of Probate Court Practice in the District of Columbia by Victor Mersch.

[5] THE COURT: That is a very good book, but it is not an authority. However, you may read it.

MR. POSTON: He says in Section 745 -- the title of that Section is:

"When undue influence may be presumed in absence of explanation.

"A caveat can establish basis for a presumption of undue influence only by proving three facts; namely, one, that there was activity toward procurement of the will in question; two, by one who was in some confidential relationship toward testator during his life; three, that the will thus procured confers a benefit upon the person who while occupying a position of confidence participated in procuring the execution of the will."

Your Honor, I submit that the number two consideration is completely lacking here. Otherwise, unless there is the presence of all three of these factors, there is no inference that can be drawn from --

THE COURT: Which factor are you referring to now?

MR. POSTON: Number two.

THE COURT: I don't know it by number.

[6] MR. POSTON: Which is the existence of a confidential relationship.

THE COURT: I disagree with Mr. Mersch. There are plenty of instances of undue influence where there is no confidential relationship.

MR. POSTON: Your Honor, let me then refer to the cases in the District of Columbia.

Believe me, I have examined, re-examined, screened and re-screened every case on undue influence in the District of Columbia and I have yet to find a case which has gone as far as this case and has survived the test of the Court of Appeals where the only three factors which possibly could influence the Court to send the case to the jury on undue influence was the fact that Mr. Fisher two months prior to the

execution of the will at the testatrix's request obtained or procured for her some will forms, if the Court will recall. This was two months prior to the execution of the will --

THE COURT: I remember the facts very well. I am not going to go over them again.

I am going to let this verdict stand, Mr. Poston. There were very suspicious circumstances here. Not only did the beneficiary procure the blank forms, but he supervised [7] the execution of the will. There was no lawyer present. He brought his own daughter and her husband as witnesses. I felt that there was a case for the jury. What I would have decided if there was no jury is immaterial, but I thought there was enough for the jury.

Of course, each case must stand on its own feet.

I am not going to disturb this verdict.

MR. POSTON: Thank you, Your Honor.

THE COURT: Now you have another motion.

MR. POSTON: Yes, Your Honor.

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[Filed June 6, 1966]

**CAVEATEE-APPELLANT'S DESIGNATION  
OF THE RECORD**

---

Now comes J. Benjamin Simmons, the appellant in the above-entitled cause and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. The Record in its entirety except
  - (a) Motion of J. Benjamin Simmons for Security of Costs with Points and Authorities, filed November 10, 1965.
  - (b) Objections of Joseph J. Malloy, Attorney for Caveators to the Motion for Security of Costs with Points and Authorities, filed November 16, 1965.
  - (c) Praecipe of attorneys withdrawing Motion for Security of Costs and withdrawing Caveators' Motion to Dismiss Petition for Employment of Counsel filed December 6, 1965.
  - (d) Caveators' list of witnesses and Caveatee's list of witnesses with certificates of service filed February 25, 1966.
  - (e) Order for Publication against Creditors in Washington Law Reporter and the Evening Star together with Notice to Creditors filed April 1, 1966.
  - (f) Motion by Caveatee by his attorney to Set Aside Order Appointing Administrator and for the Appointment of a Collector Pending Appeal together with certificate of mailing, filed April 5, 1966.
  - (g) Objection of Caveators to Motion to Set Aside Order Appointing Administrator and for Appointment of a Collector, together with certificate of mailing, filed April 11, 1966.
  - (h) Memorandum of Points and Authorities in Support of Motion for Judgment N.O.V. or in the Alternative for a New Trial, filed April 5, 1966.
  - (i) Memorandum of Points and Authorities in Opposition to the

**Motion for Judgment N.O.V. or in the Alternative for a New Trial, filed April 11, 1966.**

(j) **Inventory of Money and Debts filed June 1, 1966.**  
2. **Entire Court Reporters' transcripts of trial proceedings (except argument) and hearing on the Motion for Judgment N.O.V. or in the Alternative for a New Trial.**

**Raymond L. Poston, Jr.**  
**Attorney for Caveatee**

**Accepted:**

**Joseph J. Malloy**  
**Attorney for Caveators**

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,303

J. BENJAMIN SIMMONS,

*Caveatee-Appellant,*

v.

ELSIE M. PINNEY, WALTER BAILEY  
and MARIE BAILEY,

*Caveators-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

FILED SEP 26 1966

*G. Nathan J. P. Wilson*  
CLERK

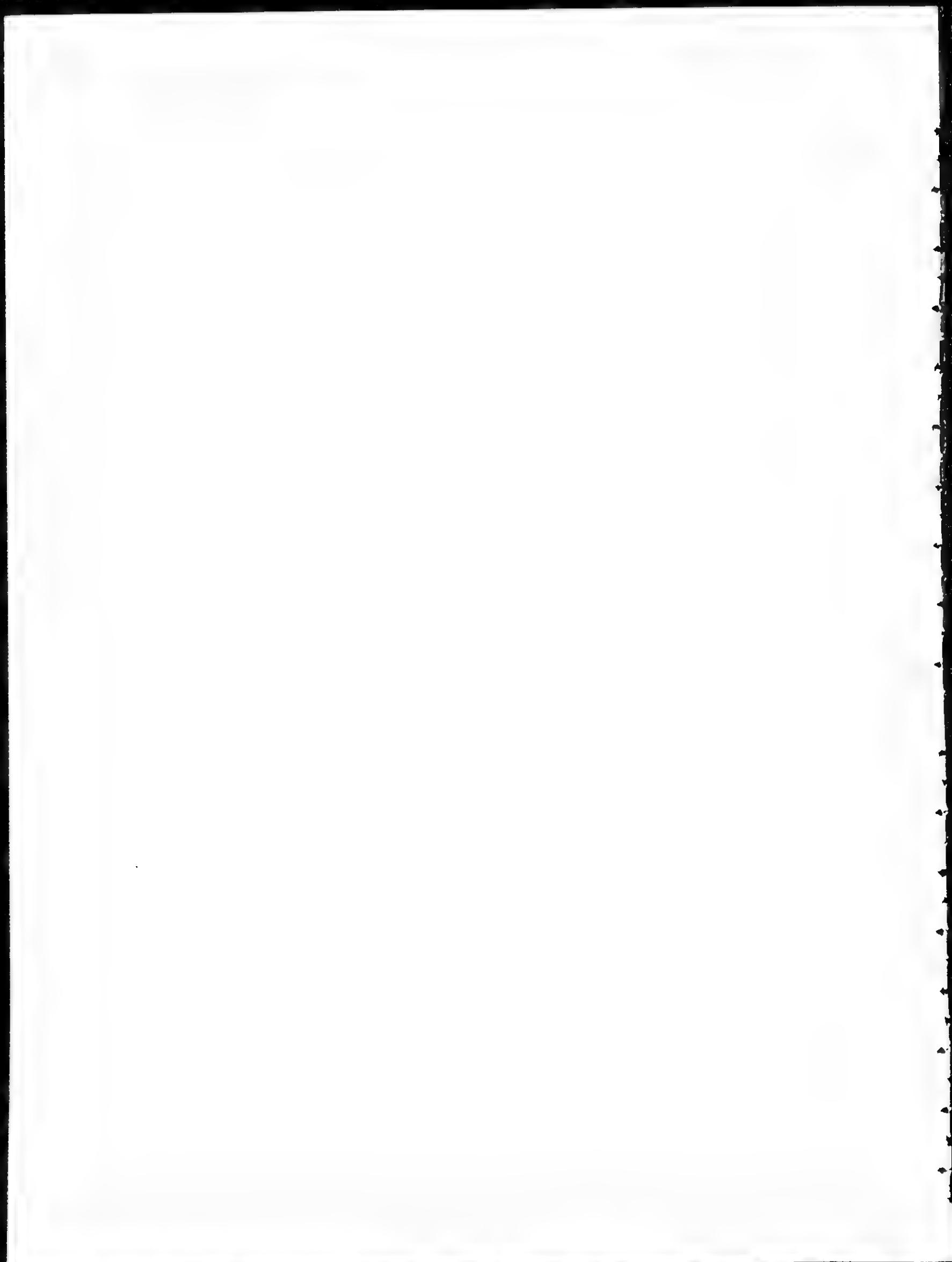
RAYMOND L. POSTON, JR.  
1762 Church Street, N. W.  
Washington, D. C.  
Attorney for Caveatee-Appellant



(i)

### STATEMENT OF QUESTIONS PRESENTED

1. Whether, under the circumstances of the case, the issue of undue influence was properly submitted to the jury.
2. Whether, under the circumstances of the case, the verdict, with regard to the issue of undue influence, was contrary to the overwhelming weight of the evidence.
3. Whether, under the circumstances of the case, the Court erred in permitting Appellees to dwell at great length on immaterial testimony alleging abusive actions by the Testatrix toward the Appellee, Marie Bailey.
4. Whether, under the circumstances of the case, the Court erred in commenting on the evidence, concerning Raymond Leon Fisher's role in the preparation and execution of the will.



## TABLE OF CONTENTS

JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF POINTS .....	5
SUMMARY OF ARGUMENT .....	6
ARGUMENT:	
I.    The Court Erred in Refusing To Direct a Verdict for the Appellant on the Issue of Undue Influence .....	7
II.   The Verdict Was Contrary to the Overwhelming Weight of the Evidence .....	21
III.  The Court Erred in Permitting Appellees To Dwell At Great Length on Immaterial Testimony, Alleging Abusive Actions by the Testatrix Toward the Appellee, Marie Bailey .....	21
IV.   The Court Erred in Commenting on the Evidence Concern- ing Raymond Leon Fisher's Role in the Preparation and Execution of the Will .....	22
CONCLUSION .....	23

## TABLE OF CASES

Bancroft v. Otis, 91 Ala. 279, 8 So. 286 .....	11
Barry v. American Security and Trust Company, 77 U.S. App. D.C. 351, 135 F.2d 430 .....	9
Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 .....	8
Beyer v. LeFevre, 22 S. Ct. 765, 186 U.S. 114, 46 L. Ed. 1080 .....	17
Brooke v. Barnes, 61 U.S. App. D.C. 161, 58 F.2d 887 .....	16
Hagerty v. Olmstead, 39 U.S. App. D.C. 170 .....	8
Johnson v. Newton, 58 U.S. App. D.C. 18, 25 F.2d 542 .....	16
Jones v. Brooks, 184 Ala. 115, 63 So. 978 .....	10
In Re Llewellyn's Estate, 296 Pa. 74, 145 A. 810 .....	12
MacMillan v. Knost, 75 U.S. App. D.C. 261, 126 F.2d 235 .....	14
Mitchell v. Van Scoyk, 1 Ill. 2d 160, 115 N.E.2d 226 .....	9

*(iv)*

Towson v. Moore, 11 U.S. App. D.C. 377, Aff'd, 19 S. Ct. 332, 173 U.S. 17, 43 L. Ed. 597 . . . . .	13
Wiggins v. Smith, 87 U.S. App. D.C. 112, 183 F.2d 831 . . . . .	8
Wiik v. Hagen, 410 Ill. 2d 158, 101 N.E.2d 585 . . . . .	9

BRIEF FOR APPELLANT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 20,303

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J. BENJAMIN SIMMONS,

*Caveatee-Appellant,*

v.

ELSIE M. PINNEY, WALTER BAILEY  
and MARIE BAILEY,

*Caveators-Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred by Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

On September 1, 1965, the Testatrix, Emma O. Lester, died in the District of Columbia at the age of 81 years, leaving a Last Will and Testament, bearing date the 1st day of July, 1965, which was executed by the

Testatrix and witnessed by two witnesses, Nancy Ferraiuolo and George Ferraiuolo, who are the daughter and son-in-law of the principal beneficiaries under said Will, Raymond Leon Fisher and his wife, Evelyn Fisher (J.A. 1). Although the Will is obviously a home-made will, it meets all of the legal requirements of a will under the laws of the District of Columbia and the Trial Court so ruled (J.A. 289).

Under the Will, the Testatrix left the Appellees, Walter Bailey and Elsie M. Pinney, a brother and sister of the Testatrix, the sum of \$3,000.00 each. She left the Appellee, Marie Bailey, another sister of the Testatrix, the sum of \$1.00, and she left her nephew, Raymond H. Bailey, the sum of \$3,000.00. With the exception of two other small bequests, she left the remainder of her estate to Raymond Leon Fisher and Evelyn Fisher, with the stipulation that Fisher retain the Deale Beach property for her dog's enjoyment during his lifetime. The Appellant, J. Benjamin Simmons, was nominated Executor of the Will (J.A. 1).

During the course of the trial all parties and witnesses were substantially in agreement concerning the nature and disposition of the Testatrix. She was a self-reliant, hard-working woman. She was a rugged individualist who had accumulated her estate through shrewdness hard bargaining, and frugality. She was dominating, aggressive and temperamental (J.A. 55, 56, 65). She continued to work on her real estate properties and carry on her various business activities, up to the time of her sudden illness, on or about August 31, 1965 (J.A. 50, 213, 235).

For a period of approximately twenty-five years prior to her death, Raymond Leon Fisher was her main source of assistance in matters concerning errands, transportation, repairs on her real estate, grocery shopping, household chores and numerous other tasks of a non-discretionary nature (J.A. 164). The Testatrix was fond of him and his family, and they were fond of her. She was like a mother to Evelyn Fisher, who also performed various tasks for the Testatrix over the years (J.A. 241). Fisher's assistance to the Testatrix was more out of friendship than for

compensation, although the Testatrix gave him gifts and approximately \$2,000.00 cash over a period of approximately twenty-five years, for services rendered on an average of ten hours a week during this period (J.A. 165).

An important aspect of the trial was the absence of even one sentence of testimony by the Appellees and their witnesses that cast even the slightest shadow of any misconduct or impropriety with regard to Fisher's relationship with the Testatrix. To the contrary, Walter Bailey, the relative having the closest contact with the Testatrix, had the greatest respect for Fisher. He had a good opinion of Fisher because he was relieving him of many things, and he was glad he was around (J.A. 85).

Over the years, the Testatrix became less friendly with her brother and sisters, especially Marie Bailey, from whom she was completely alienated (J.A. 175, 207). She resented the fact that her brothers and sisters were not more attentive and their complaints about her housekeeping and dogs (J.A. 176, 177). Although her relatives had special knowledge which would have helped her in her lawsuit in Maryland, concerning the boundaries of her beach property, she requested her attorney not to contact any of her relatives for the purpose of having them testify in the case (J.A. 254).

From the evidence, the Testatrix had made at least one will prior to the will of July 1, 1965, and it was also a home-made will, which was executed in 1953, just prior to her going into a hospital for an operation. In that will, as in the instant will, the Testatrix left to Raymond Leon Fisher her large beach property, which constituted a substantial portion of her estate (J.A. 270, 271).

Several months before she died, the Testatrix again manifested interest in executing a will. During the first week of May, 1965, Raymond Leon Fisher, at the request of the Testatrix, procured for her two will forms from a stationery store (J.A. 151). The Testatrix visited the law

office of J. Benjamin Simmons on June 17, 1965, when she discussed generally her desire to execute a will (J.A. 140). On the morning of July 1, 1965, at approximately 11:30, Raymond Leon Fisher went to the home of the Testatrix at 1525 S Street, N. W., Washington, D. C. (J.A. 157). At that time she told him that she had a will prepared and she wanted to know if he could find someone who could witness the will for her. They discussed getting two of her friends, Mrs. Emma Tull and Mrs. Geraldine Bracken, to witness the will, but Fisher called them and they were not at home. At that point, Fisher suggested the possibility of getting his daughter and son-in-law, Nancy Ferraiuolo and George Ferraiuolo, to witness the will. The Testatrix was in agreement with this suggestion. Because of the fact that the Testatrix wanted to take care of the will on that very day, Fisher telephoned his daughter, who in turn telephoned her husband, and they arrived at the home of the Testatrix some time between 1:00 p.m. and 2:00 p.m. on July 1, 1965 (J.A. 153, 154, 157). They were met at the door by Fisher, who let them in. He then collared the dog and remained in the living room, while the Ferraiuolos went to the adjoining room where the Testatrix was sitting (J.A. 154). While the Testatrix and the two witnesses were witnessing the Will, Fisher remained in the living room, approximately twenty feet away, entertaining the dog. After the execution of the Will, the witnesses remained to have a cup of tea with the Testatrix and, after a short period of time, left (J.A. 155). The Testatrix then turned the Will over to Fisher, explaining that if anything happened to her and the family found it, they would tear it up (J.A. 158). Fisher kept the Will at his home in a metal box until one or two days after the death of the Testatrix, when he turned it over to J. Benjamin Simmons, Appellant, the nominated Executor of the Will, in accordance with the instructions of the Testatrix (J.A. 140, 156). On July 1, 1965, the Testatrix appeared normal in every way to George Ferraiuolo, Nancy Ferraiuolo, and Raymond Leon Fisher (J.A. 26, 32, 158). Fisher did not know who prepared the Will (J.A. 156).

There is no evidence showing that Fisher directly or indirectly influenced or attempted to influence the Testatrix in the making of her will. Fisher's testimony is to the contrary (J.A. 181). The evidence on both sides, taking into consideration the description of the Testatrix, showed strongly that the Testatrix was the dominant party in her relationship with Fisher (J.A. 47, 56, 61, 65).

The Trial Court denied a Motion for Directed Verdict and permitted the case to go to the jury on the issues of undue influence and mental capacity (J.A. 283). The jury returned a finding that the will was procured by undue influence and that the Testatrix had mental capacity to make and execute a will (J.A. 310). Accordingly, the Trial Court entered an Order Denying Probate on March 29, 1966 (J.A. 17). On May 3, 1966, the Trial Court overruled a Motion for Judgment N.O.V. and In The Alternative For a New Trial (J.A. 21). The Trial Court, at the hearing of said Motion, acknowledged that it did not think there was a confidential relationship between the Testatrix and Raymond Leon Fisher (J.A. 313). Previously, during the course of the trial, the Court refused to find a confidential relationship (J.A. 307, 308).

Appellant hereby appeals from the Order Denying Probate.

#### STATEMENT OF POINTS

1. The Court erred in refusing to direct a verdict for the Appellant on the issue of undue influence.
2. The verdict was contrary to the overwhelming weight of the evidence.
3. The Court erred in permitting Appellees to dwell at great length on immaterial testimony, alleging abusive actions by the Testatrix toward the Appellee, Marie Bailey.
4. The Court erred in commenting on the evidence concerning Raymond Leon Fisher's role in the preparation and execution of the Will.

## SUMMARY OF ARGUMENT

Since there was no direct evidence of undue influence, it was incumbent on Appellees to establish a confidential relationship between Fisher and the Testatrix, and to prove material actions on the part of Fisher, constituting active participation in the procurement of the Will before they earned the benefit of a presumption or inference of undue influence. Mere suspicion is not enough. No confidential relationship was established and the Court agreed. Serious doubt exists whether the acts of Fisher, in purchasing the will forms and assisting in summoning witnesses, all at the request of the Testatrix, constituted such activity in the procurement of the will that would give rise to a presumption of undue influence, even if a confidential relationship were established. For these reasons, the Trial Court should have granted Appellant's motion for a directed verdict on that issue.

The Court erred in permitting Appellees to dwell at great length, over the objection of Appellant, on alleged abusive actions of the Testatrix toward the Appellee, Marie Bailey, which created undue sympathy in the jury.

The Court erred in commenting on the evidence that Raymond Leon Fisher procured the will form, arranged for the witnesses and took custody of the will, without counterbalancing these comments with comments on the testimony of Fisher, explaining that the subscribing witnesses, Fisher's daughter and son-in-law, were present at her request and only after an attempt had been made to have other subscribing witnesses present; that Fisher took custody of the Will at her request and because she said she was afraid it might be destroyed by her relatives if left in the house.

The Court erred in commenting on the evidence that Raymond Leon Fisher did not disclose to the Appellees the contents of the Will, without going further and explaining that it would be improper to make such dis-

closure, even in the absence of an express request by the Testatrix not to disclose said information.

The Court erred in overemphasizing the fact that no evidence was introduced showing who typed the Will and categorized this situation as a "mystery."

## ARGUMENT

### I.

#### **The Court Erred in Refusing To Direct a Verdict for the Appellant on the Issue of Undue Influence.**

Throughout the course of the six-day trial of this cause, there was not a scintilla of evidence showing that Fisher or anyone else exerted any influence of any kind in procuring the Will of the Testatrix. Absolutely no evidence appeared in this case showing any domination or attempted domination of the Testatrix by Fisher or, in fact, any *ability* to dominate this crusty and hard-bitten old lady. All the evidence is overwhelmingly to the contrary; that the Testatrix actually dominated Fisher. The question then arises, should a jury be allowed to speculate whether there was undue influence, in the absence of direct evidence of undue influence or the ability to exert undue influence, based on innuendos drawn by the jury from collateral facts?

Authorities are in general agreement that, before a presumption or inference of undue influence arises, in the absence of direct evidence, three elements must be present; namely, (1) activity toward the preparation and execution of the will; (2) by one who is in some confidential relationship to the Testator during his lifetime; and, (3) that the will thus procured confers a benefit upon the person who, while occupying a position of confidence, participated in procuring the execution of the will.

With regard to the first element (activity in the preparation and exe-

cution of the will), there is very serious doubt if the acts of Fisher in connection with the Will were sufficient to constitute the nature and extent of the activity required to raise a presumption, even if the other two elements were present. Fisher's only activity in connection with procuring the Will was to buy, at the request of the Testatrix, two blank will forms two months prior to the execution of the Will and assisted here, at her request, in arranging for witnesses. *Fisher had nothing to do with the actual preparation of the Will*, and, in fact, did not know who prepared the Will. Undoubtedly, the nature and extent of the activity involved must be such as to indicate that the will is more the will of the beneficiary than that of the testator. *Hagerty v. Olmstead*, 39 App. D.C. 170; *Wiggins v. Smith*, 87 U.S. App. D.C. 112, 183 F.2d 831. In both of these cases, there was very strong evidence of activity and control by the beneficiaries in the actual preparation of the will that amounted to actions proprietary in nature.

In the instant case, the second element requiring a confidential relationship is completely lacking. There was no confidential or fiduciary relationship established and this was acknowledged by the Trial Court (J.A. 313). The evidence portrayed Fisher as nothing more than an errand and chore man.

The case of *Belfield v. Coop*, 8 Ill. 2d 293, 134 N.E.2d 249, holds, where a will is made for the chief benefit of the person causing it to be prepared, no presumption of undue influence arises in the absence of a fiduciary relationship. In the *Belfield* case, the Court made the following observations:

"It is only where a fiduciary relationship exists between the testator and devisee, who received a substantial benefit from the will, where the testator is a dependent and the devisee a dominant party, and where the testator places his trust and confidence in the devisee, and the will is written or its preparation procured by the devisee, that a presumption of undue influence

arises. *Wiik vs. Hagen*, 410 Ill. 158, 101 N.E.2d 585; *Mitchell vs. Van Scoky*, 1 Ill. 2d 160, 115 N.E.2d 226. At page 612 of 5 Ill. 2d, at page 625 of 126 N.E.2d, it is stated: 'In all the cases cited and relied upon by the contestants, the rule is laid down that requires the following: (1) That there must be a fiduciary or confidential relationship, (2) that the devisee is the dominant and the testator is the dependent party, and (3) that the will was procured by and in favor of the fiduciary through the use of his dominant fiduciary or confidential relationship.' This is a clear statement that absent a fiduciary relationship no presumption of undue influence can arise."

A striking similarity exists in the facts in the case of *Barry v. American Security and Trust Company*, 77 U.S. App. D.C. 351, 135 F.2d 430, and the instant case. In the *Barry* case the Court stated:

"The hearing on the Caveat was heard in November, 1938, and verdict was directed for the propounders. So far as the record below shows, there was not a scintilla of evidence to justify the allegations of the Caveat that the will was not properly executed, that the Testatrix did not declare it to be her Last Will and Testament in the presence of attesting witnesses, or that the witnesses did not sign, at her request. And the same may be said of the allegations of mental incapacity, fraud, or undue influence. Testatrix was shown to be a woman of advanced age, but there is no evidence of mental weakness or other mental incapacity. On the contrary, all the evidence was to the effect that she was a woman of strong and determined character. She lived alone in the City of Washington and seldom saw her nephews, or other relatives, who lived in New York. She was much attached to Murphy, an unmarried young man, who became acquainted with her in 1931 and who, during the last several years of her life, showed her all the care and attention that might have been expected of a dutiful son, aiding her in her business affairs,

attending to her marketing for her, seeing that she was cared for in her illness and visiting her often. While there was evidence that Testatrix was devoted to Murphy, was advised by him and made him presents, there is not the slightest evidence that he was guilty of any fraud upon her or in any way controlled her action in the making of the will. On the contrary, the evidence is that she wrote out in her own handwriting the provisions she wished incorporated, using a former will as a guide, and that she consulted with a representative of the trust company with regard to the matter in Murphy's absence. It is true that she had Murphy copy her notes in the form of a will, after the representative of the trust company had advised that he could not render this service, but she herself called the witnesses to the will, representatives of the trust company, and executed it at a time when Murphy was not present. There is ground for contention that Murphy cultivated the friendship of Testatrix, with the expectation of profit, but none that he substituted his will for hers in the disposition of her property. It is well settled that influence gained by kindness and affection will not be regarded as undue, if no imposition of fraud be practiced."

In the *Barry* case, it seems quite clear that Murphy's relationship with the Testatrix was more in the nature of a fiduciary and confidential character than the relationship existing in the instant case, and that there was actual activity by Murphy in the *preparation* of the will in contrast to the situation in the instant case, where there was no activity by Fisher in the actual *preparation* of the will; yet, this Court affirmed a directed verdict in that case in favor of the proponent of the will on the issue of undue influence.

With regard to the extent and the nature of the activities of the beneficiary in connection with the preparation and execution of the will, the case of *Jones v. Brooks*, 184 Ala. 115, 63 So. 978, gives an interesting

insight into what activities on the part of the beneficiary amount to actual activity in the procurement of the will. The Court, in that case, stated:

"It was held in the well-considered case of *Bancroft vs. Otis*, 91 Ala. 279, 8 So. 286, which has been often followed and cited, that, upon the contest of a will, the contestant does not place the burden of proof upon the beneficiary of showing that the act was voluntary and did not result from undue influence by merely showing a confidential relationship between the parties, but he must go further and produce evidence tending to show active interference on the part of the beneficiary in procuring the execution of the will. . . .

"The activity, however, upon the part of the beneficiary in order to cast the burden of proof upon him, must be more than activity and interest referable solely to a compliance with or obedience to the free and voluntary instructions or directions of the testator. . . .

"Applying the foregoing rule to the case at bar, we are of the opinion that the only activity or interest shown by this contestee was in attempting to get the Testatrix to sign a certain paper prepared by him at her request, and after repeated suggestions from her that she wished to make her will, leaving him all of her property, and after she had repeatedly expressed a desire and intention to will him her said property to diverse and sundry persons. It also appears that, after the paper was written by the contestee and was shown, or handed, to his wife, she deemed it insufficient and for that or other reasons declined to sign it; that he did not urge or insist upon her signing it, but immediately destroyed it. It may be true that he brought the scrivener of the present will to the house, W. T. Rutledge; that the evidence shows that he went for said Rutledge and his wife, in order to have company and assistance in his home while his wife was undergoing a surgical operation then in contemplation by the physicians; and the proof further shows that he made no mention of a

will to anyone, and that no mention was made of a will until the said Rutledge reached the house and was informed by Mrs. Jones that she wished him to prepare her will, and there is no evidence that this contestee urged or requested his wife to make such a will. We do not think that the evidence showed such activity on the part of this contestee as to cast upon him the burden of proof as to undue influence, but, if it did, we think that the evidence, when taken in connection with the surrounding circumstances and the conduct of the contestee, is sufficient to overcome all presumption of undue influence and to show that the making of the will was a voluntary and untrammeled act of the Testatrix."

The case of *In Re Llewellyn's Estate*, 296 Pa. 74, 145 A. 810, goes further into the nature and extent of the activity by the beneficiary, which would constitute active procurement of the will. In that case, the testator and beneficiary had been life-long friends and business associates. Llewellyn died, leaving a one million dollar estate. There was no ill feeling between the decedent and his cousins, who were his heirs, but with one exception they were not in the habit of visiting him and there was little, if anything, in common between him and them. In that case, the Court stated:

"Appellant urges that there was a confidential relation here such as placed upon proponent the burden of proof. As to this, the Hearing Judge at Orphan's Court found there was no confidential relation. Furthermore, even in the case of a confidential relation, the burden of proof is placed upon the legatee only where he is instrumental in procuring the legacy. Here Swartley did not draw the will or suggest that it be drawn, or that he be made legatee. On the contrary, it was drawn by a lawyer he had never seen before and who was called at the decedent's request. In summoning the attorney and in handing the draft of the will to Llewel-

lyn, Swartley acted merely as his messenger. The active part, which gives rise to the presumption, must go to the substance of the testamentary act, not to some mere formal matter. In the absence of such procurement, no burden of proof rests on the legatee. (Editorial Note: Swartley also summoned the witnesses) . . . .

"Llewellyn usually attended to his own business but, as he became physically weak, Swartley did some things for him, such as drawing checks and paying bills; also, during the later weeks of his illness, when the decedent had become too weak to attend to his wants at night, Swartley slept in the same room and looked after him. . . .

"Ross, securing from the latter a piece of farm stationery, wrote thereon the will in question and left it, saying that it would be all right if that was what Llewellyn finally decided to do. The next morning the latter asked Swartley if Ross left any paper, and, the draft of the will being brought into the room, sat up in bed and read it, then saying it would need witnesses, he asked Swartley to call in the nurse and the maid, which was done, and the will was signed in their presence and witnessed by them. At the same time he signed and they witnessed a letter of attorney authorizing Swartley to sign and endorse checks, etc. at the real estate trust company. Swartley took charge of the papers, and, aside from his expression of gratitude to Llewellyn and a discussion of how the latter desired to have the farm kept up, the matter was not again mentioned."

A review of the District of Columbia cases on undue influence, in the procurement of wills, convinces one that a will cannot be set aside unless there is strong and compelling evidence that the will of the testator was overcome and his free agency destroyed by some improper practice and influence being brought to bear upon him.

In the case of *Towson v. Moore*, 11 App. D.C. 377, 19 St. Ct. 332,

173 U.S. 17, 43 L. Ed. 597, the Court of Appeals affirmed a directed verdict in favor of the caveatee. Undue influence charged by the caveator was based on testimony that the testatrix had voiced intentions to treat their children equally in her will and on the testimony of a witness, as to a conversation had with the testatrix, which was as follows:

"She (Mrs. Mary I. Campbell) told me that Mrs. Moore and Mrs. Russell said that if she was to outlive Miss Eloise Campbell she would divide Twelve Thousand Dollars (\$12,000.00) between them equally, and that they worried her so to get rid of them she promised them."

In that case the Court observed the following:

"Influence gained by kindness and affection will not be regarded as undue influence if no imposition of fraud be practiced even though it induces the testatrix to make an unequal and unjust distribution of her property in favor of those who have contributed to her comfort and ministered to her wants, if such disposition is voluntarily made."

In that case, there was at least some evidence of pressure on the testatrix by the beneficiaries. In the instant case, there is none.

In the case of *MacMillan v. Knost*, 75 U.S. App. D.C. 261, 126 F.2d 235, the caveators made out a much stronger case of undue influence than was established in the instant case. In the *MacMillan* case, the Court of Appeals reversed a jury verdict, stating that a directed verdict should have been rendered by the Trial Court in favor of the Caveatee. In that case, the testatrix was seventy-six years old. Her will left her entire estate to her late husband's grandnephew. The caveator was her niece, who had been beneficiary under her previous wills. There was testimony by the attorney for the testatrix that she had stated before her death that she did not want to carry five thousand dollars on her trip to California with the caveatee, because she was afraid he would get it away

from her if she did. The attorney further testified that the testatrix had said that her grandnephew by marriage had asked her to change her will, making him sole beneficiary, and she had said she would never change it. Shortly thereafter, when they had reached their destination in California, she told the caveator's brother, who was a doctor, that she wished to make a will. This doctor drew up the will in his office. The testatrix executed it then and there and the doctor witnessed it, as well as another person not connected with the parties.

Despite these highly suspicious circumstances, the Court held as follows:

"Counsel for caveator says that the caveatee carried on a 'campaign to secure for himself the estate of this aging widow.' Fortunately for aged widows and sometimes unfortunately for the next of kin, the law does not penalize such campaigns. If appellant hoped to be, asked to be and was rewarded for his kindness it does not follow that he used undue influence."

As the Court told the jury, undue influence involves improper means and practices. Influence gained by kindness and affection will not be as undue.

The Court, in that case, further observed:

"Confidential relations between the testatrix and beneficiaries do not alone furnish any presumption of undue influence . . . one has a right to influence another to make a will in his favor. He may lay his claims for preferment before the testatrix. They may be based on kinship, friendship, kindness, services or any other sentimental or material consideration. One can use argument or persuasion so long as it is fair and honest and does not go to an oppressive degree or become coercive. These instructions state the law of the District of Columbia. Moreover the mere possibility or suspicion of undue influence is not enough."

The instant case, in contrast with the *MacMillan* case, reveals not the slightest evidence of any type of influence being exerted on the Testatrix, whether it be proper influence or undue influence.

In the case of *Johnson v. Newton*, 58 App. D.C. 18, 25 F.2d 542, which affirmed a directed verdict for the caveatee, there is very persuasive support that the instant case should not have gone to the jury. The facts, briefly, are as follows:

The testatrix was seventy-five years old *in extremis*. Mrs. Stone, her niece, visited her on her death bed. Mrs. Stone asked the other niece of the testatrix if the testatrix had made a will and was informed that she had not. Mrs. Stone then asked the aunt if she would like to make a will and was informed in the affirmative. Mrs. Stone then summoned a neighbor, not a lawyer, to write a will for the testatrix. Mrs. Stone played a very active part, in not only the execution of the will, but the preparation of the will. Mrs. Stone and her daughter were the principal beneficiaries under the will. The testatrix signed her will with an "x" and died the next day. The Court of Appeals stated as follows:

"As to the first of these grounds, it is not contended that there resulted direct evidence of undue influence, but it is argued that the facts and circumstances surrounding the making of the will created the presumption of undue influence entitling appellant to go to the jury on that issue. We are of a different view."

In the *Johnson* case there was active participation by the principal beneficiary in the execution and preparation of the will, and yet the Court held that this did not give rise to any presumption of undue influence.

In the case of *Brooke vs. Barnes*, 61 U.S. App. D.C. 161, 58 F.2d 887, the Court of Appeals reversed the Trial Court in failing to grant a directed verdict to the caveatee, on the grounds of insufficient evidence of undue influence. The facts were as follows:

The testatrix died August 22, 1930 at the age of eighty-three, leaving a son and daughter. The son, Dr. George M. Barnes, charged that there was undue influence in procuring the will disinheriting him. The evidence introduced by the caveator on the issue of undue influence was based on a conversation he had with his sister in May of 1915, in which his sister stated that the testatrix had disinherited him and that she (the sister) had fixed it so; that her mother had written him out of the home as a son; and that "you can expect nothing from mother."

The Court stated:

"At most there is a mere possibility or suspicion of undue influence. Testimony of the caveator to the effect that back in 1915 the daughter told him to the effect that he had been disinherited; that she had seen to that; does not tend to establish undue influence. His sister had a right to state her reasons to her mother why her mother's property should not be left to a particular person and why it should be left to the caveatee. Unless such statement was of a coercive nature (and there was no evidence that it was) it did not tend to establish undue influence."

In *Beyer v. LeFevre*, 22 S. Ct. 765, 186 U.S. 114, 46 L. Ed. 1080, the Supreme Court reversed a finding for the caveator. The facts in the case are, briefly, as follows:

The testatrix was sixty-five years of age; had made comments that she intended her property to go to her husband; had a very close relationship with her nephew, Louis Beyer, Jr. He advised her as to some legal aspects of a will. He suggested a name of an attorney, which suggestion she refused. He then proposed to call a Mr. Brennan, an attorney, and she agreed. When Mr. Brennan arrived, the testatrix was lying in bed. She then gave instructions to him as to how the will was to be written. The will was executed and Mr. Brennan took it to his office. Upon later examination by him, he discovered a technical defect in the will, and on

Monday, the day after the execution of the first will, he called on the testatrix with a corrected will to be executed. At that time she said that, inasmuch as there would have to be a new will executed, she would like her niece, Mrs. Johnson, included in the will, as an equal beneficiary with her nephew. Whereupon Mr. Brennan returned to his office and prepared a third will, and on Tuesday returned to the house of the testatrix, where it was executed. With regard to undue influence, the Court pointed out there was not the slightest indication that her nephew had urged the testatrix to make a will or even suggested or spoke to her of the matter. The only connection he had with it was in response to an inquiry as to what would be the disposition of the property without a will, the validity of a will made on Sunday, and in suggesting the name of an attorney to prepare the will and asking him to come to the house. The Court, in this regard, stated:

"Now to find that the will was obtained by undue influence on his part when there is not the slightest syllable tending to show that he ever said or did anything toward securing the execution of the will except at her request, is a proposition which cannot for one moment be entertained."

With regard to the undue influence of the niece, there was substantial evidence that she, Mrs. Johnson, used rather strong language to the testatrix for the purpose of influencing her to include her in the will. There was testimony by a witness of the following instructions by Mrs. Johnson to Louis Beyer, Jr., as follows:

"You go downstairs and after you get the wagon hitched up, take Mrs. Stone around to the Christian Endeavor encampment. If she knows what is going on here she won't leave here tonight until she gets a share of the profits."

The witness stated further that she had overheard Mrs. Johnson asking the testatrix about making a will and the testatrix refused saying that she would leave everything to her husband, to which Mrs. Johnson replied:

"If this is the way you're going to treat me after I have been working for you all these years and if this will be all the thanks I get . . ."

The witnesses stated further that after the testatrix had been taken to her bed, Mrs. Johnson asked her to make a will and the testatrix refused. Mrs. Johnson then said:

"Yes, you'll leave it to him and he will sink it in a boat or rum mill . . ."

And the testatrix replied:

"Nellie, how can you talk about your uncle like that?"

And also:

"Nellie, you are harassing me to death."

Whereupon Mrs. Johnson said she would go if the will was not made and the testatrix replied:

"You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it."

With regard to this conversation, the Court stated:

"We put out of consideration the fact that Mrs. Johnson contradicts the witness in having urged the testatrix to make a will on her behalf or to make a will at all and inquire whether, giving the fullest weight to this testimony it warrants a finding that the execution of this will was secured by undue influence. We declare that it does not. The conversations which the witness stated were heard while the testatrix was about the house and attending to her ordinary duties are conversations which naturally can be heard between one brought up in the family as Mrs. Johnson was and one who had been to her as a mother. It would not be strange that having lived all her life in the family she felt that there was something due her in respect to the disposition of the property. It will be remembered that

it is not influence but undue influence that is charged and is necessary to overthrow a will. May not one situated as Mrs. Johnson was properly plead her claims for recognition in a will? May she not give her reasons why a will should be made and why her property should not be left to a particular person without being subject to the charge of exerting undue influence?"

In conclusion the Court stated:

"Whatever rule may obtain, we wish that it be distinctly understood that it be the rule of the Federal Courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The express intentions of the testatrix should not be thwarted without clear reason therefor."

The Court permitted the instant case to go to the jury on the bare facts that Fisher had purchased the will forms, arranged for the witnesses and then took custody of the Will, all at the request of the Testatrix. All affirmative evidence at the trial supports the position that Fisher had nothing to do with the preparation of the Will, either as to form or content. His activity with regard to the execution of the Will, was in the role of an errand boy, the role he had played for twenty-five years. It is the position of the Appellant that these facts are not sufficient at law to give rise to any inference that would justify the deliberations of a jury.

## II.

**The Verdict Was Contrary to the Overwhelming  
Weight of the Evidence.**

Not the slightest scintilla of evidence was introduced to show that the will was procured by influence exerted on the Testatrix by Raymond Leon Fisher or anyone else, overcoming her will and destroying the free agency of the Testatrix. No presumptions or inferences of undue influence arose, as no confidential relationship was established, and the acts of Fisher in assisting the Testatrix, with regard to the execution of her will, were not such as to constitute a material part in the procuring of the will. These points are discussed, in detail, *infra*.

## III.

**The Court Erred in Permitting Appellees To Dwell at Great  
Length on Immaterial Testimony, Alleging Abusive Actions  
by the Testatrix Toward the Appellee, Marie Bailey.**

Over the objections of Counsel for the Appellant, the Court permitted the Appellees to introduce into evidence long, detailed accounts of abusive actions on the part of the Testatrix toward the Appellee, Marie Bailey, which no doubt engendered undue sympathy in the jury. (JA 115, 119) Since the Appellees offered no evidence on undue influence on the part of Fisher, their strategy was to try the issues in this case on the basis of the conduct of the Testatrix toward other members of her family.

## IV.

**The Court Erred in Commenting on the Evidence  
Concerning Raymond Leon Fisher's Role in the  
Preparation and Execution of the Will.**

The learned Trial Court, with regard to the instructions as to the law, charged the jury in a very fair and proper manner. However, the Trial Court's comments on the evidence were prejudicial to the Appellant, in that there was not a fair balancing of both sides of the evidence on the most crucial points that were introduced during this six-day trial, which covered the part that Fisher played in the preparation and execution of the Will.

The Trial Court commented that Raymond Leon Fisher procured the will forms, arranged for the witnesses and took custody of the will, without counter-balancing these comments with comments on the testimony of Fisher, explaining that the subscribing witnesses, Fisher's daughter and son-in-law, were present, at her request, only after an attempt had been made to have other subscribing witnesses present; and, that Fisher took custody of the Will, at the request of the Testatrix, and because she stated, "if anything happened to her and the family found it they would tear it up." (J.A. 304)

The Court erred in overemphasizing the fact that no evidence was introduced showing who typed the Will, categorizing this situation as a "mystery." (J.A. 305)

The Court also erred in commenting that Fisher did not disclose to the Appellees the contents of the Will, without going further and explaining that it would be improper to disclose, without permission, the contents of a will, even in the absence of an express request by the Testatrix not to disclose said information (J.A. 304).

These comments tended to suggest an aura of sinister, behind-the-scenes activity on the part of Fisher, which was not established by the

evidence. These errors in commenting on the evidence were of such nature that they were incorrectable after the Court had made its initial charge, and they, coupled with the inflammatory testimony permitted into evidence by the Court, alleging abuse of Marie Bailey, may well have been the deciding point in the minds of the jury.

#### CONCLUSION

In summary, there are approximately twenty Court of Appeals cases on undue influence in the District of Columbia. Not one verdict in these cases has stood the test of an appeal where there is no direct evidence of undue influence, no evidence of domination or predisposition toward domination of the testatrix by the beneficiary under the will, no evidence of activity in the actual preparation of a will and no evidence of a confidential relationship. If this verdict survives the test of appeal, it will constitute new law on undue influence in the District of Columbia.

The admission into evidence by the Court of immaterial facts, concerning the alleged abusive actions by the Testatrix, together with the Court's errors in commenting on the evidence, concerning the preparation and execution of the Will, motivated the jury to render a verdict contrary to the evidence, based on emotion and a desire to correct an imagined injustice perpetrated by the Testatrix, not Fisher, on the members of her family.

The verdict of the jury is patently contrary to the intentions and desires of the Testatrix. Undisputedly, the Testatrix did not desire the Appellee, Marie Bailey, to share in her estate. The overwhelming weight of the evidence showed that she wanted the principal beneficiaries to have the bulk of her estate. It is ironic that the same willingness to satisfy her every whim and desire over the years was the vehicle that served to deny Fisher his reward. His sole offense was that he served the Testatrix only too well. The verdict of the jury, if allowed to stand, would be a gross miscarriage of justice.

For all the reasons outlined herein, it is respectfully prayed that this Court reverse the Order of the United States District Court for the District of Columbia Denying Probate and direct said Court to admit to probate the Will of Emma O. Lester dated July 1, 1965.

Respectfully submitted,

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Washington, D.C. 20036  
*Attorney for Appellant*



BRIEF FOR APPELLEES

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 20,303

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J. BENJAMIN SIMMONS,

*Caveatee-Appellant,*

v.

ELSIE M. PINNEY,

WALTER BAILEY,

and

MARIE BAILEY,

*Caveators-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals  
for the District of Columbia Circuit

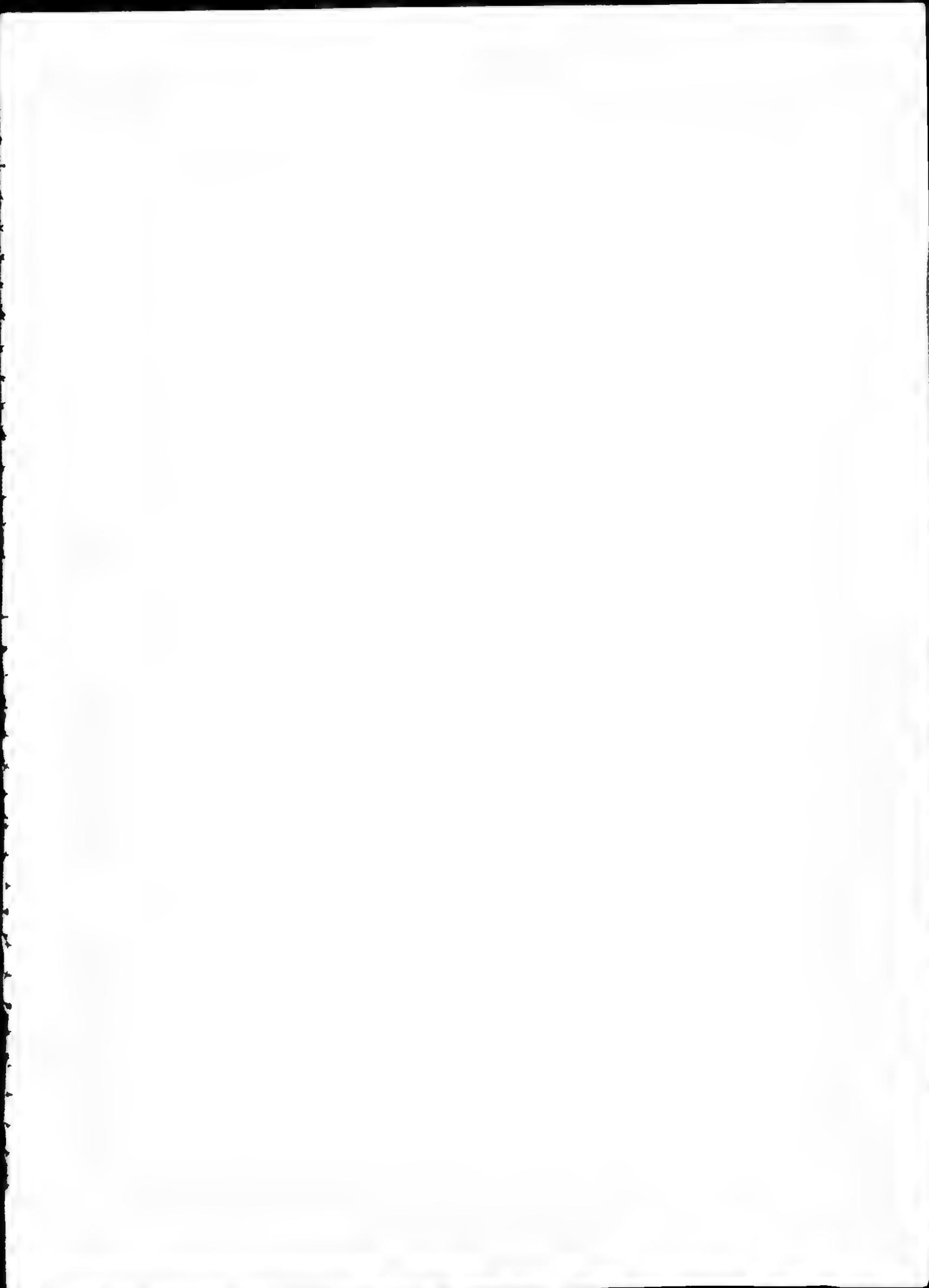
FILED Oct 10 1966

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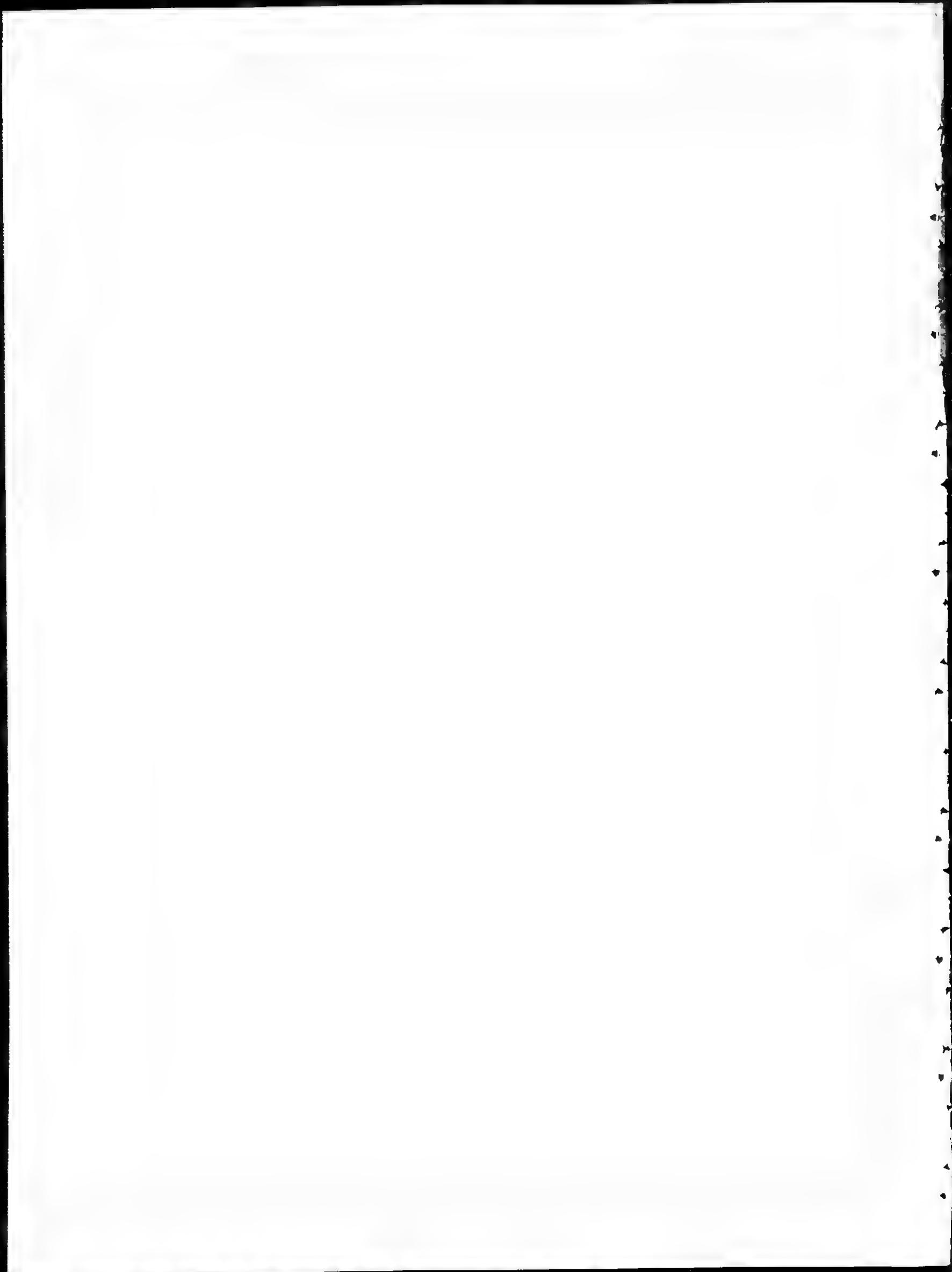


(i)

### STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees the questions are:

1. Whether the Court erred in refusing to direct a verdict for appellant in a trial of issues framed on a caveat, by two sisters and a brother of testatrix, to determine the mental capacity of testatrix, an 81 year old widow, and whether her alleged will had been procured by undue influence practiced by the principal beneficiary, a man testatrix relied on heavily, not a blood relative, whom appellant characterized as her right arm in handling her transactions and helping her take care of her business.
2. Whether there was sufficient evidence to sustain the verdict of a jury, finding that a purported will was procured by the undue influence of the principal beneficiary in a will contest involving issues of mental capacity and undue influence.
3. Whether, in a will contest involving issues of mental capacity and undue influence, the Court erred in admitting testimony by the appellees to refute statements of appellant that one of the appellees, a sister, was completely alienated from the testatrix who, appellant contended, believed that appellees were not sympathetic with her problems and were unwilling to take the time and trouble to render any real assistance to testatrix.
4. Whether the Court erred in commenting on the evidence, concerning the role of the principal beneficiary in the preparation and execution of an alleged will, when the Court instructed the jury that if the jury view of the evidence in any respect differs from the Court, the view and understanding of the jury must prevail because the final decision on the facts is solely within the province of the jury.

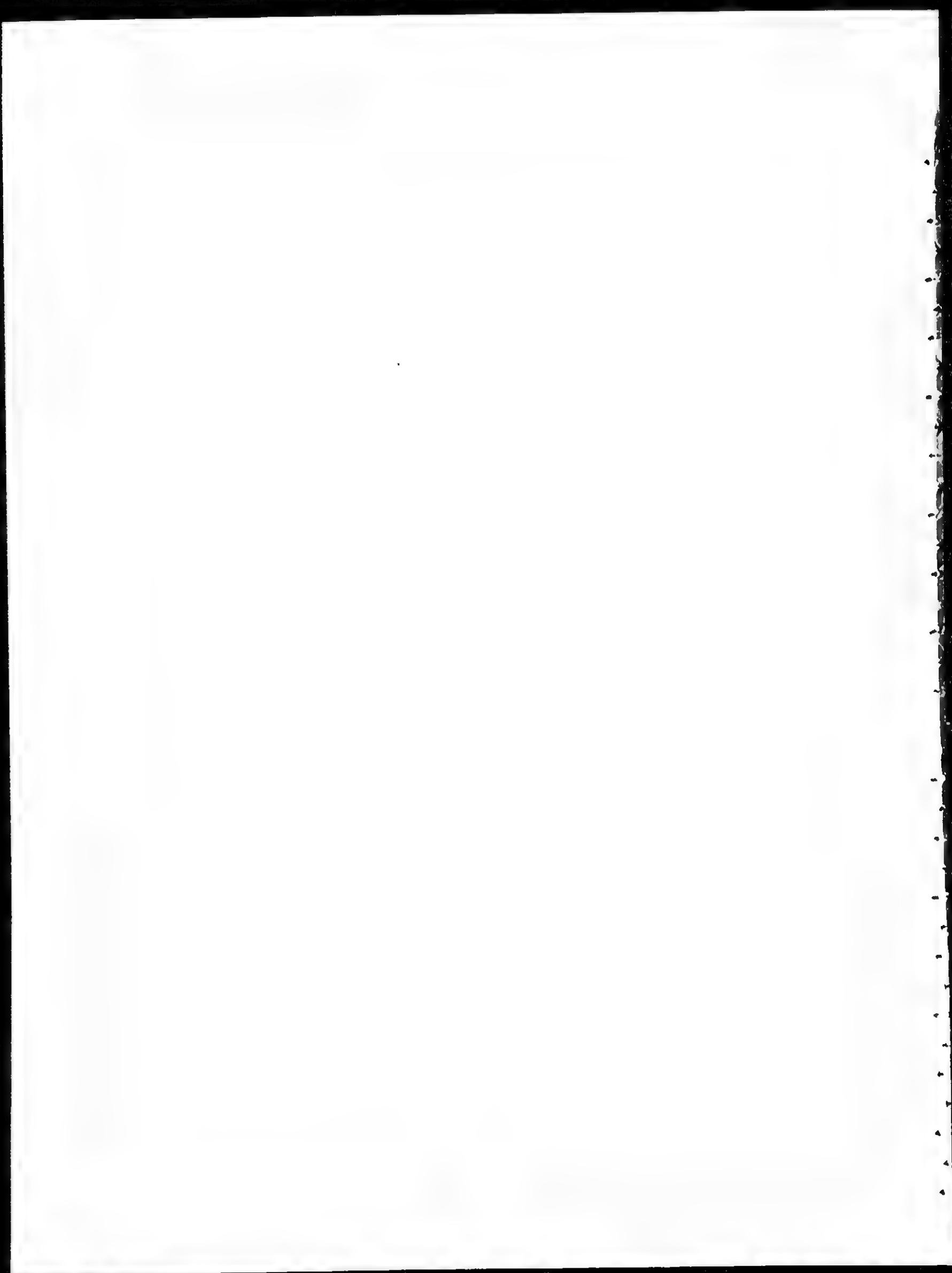


## TABLE OF CONTENTS

COUNTER-STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	8
ARGUMENT:	
I. The Court Did Not Err in Refusing To Direct a Verdict for the Appellant on the Issue of Undue Influence. The Issue Was Properly Submitted to the Jury .....	9
II. The Verdict Was Not Contrary to the Weight of the Evidence. There Was Sufficient Evidence To Sustain the Verdict Finding Undue Influence .....	12
III. The Court Did Not Err in Permitting Testimony by Appellees To Refute Contention of Appellant That Appellees Were Unwilling To Render Assistance to Testatrix. ....	15
IV. The Court Did Not Err in Commenting on the Evidence Concerning Raymond Leon Fisher's Role in the Preparation and Execution of the Will. The Court Instructed That the Jury Was Sole Judge of Facts .....	16
CONCLUSION .....	17

## TABLE OF CASES

Barbour v. Moore, 10 App. D.C. 30 .....	14
Duckett v. Duckett, 77 U.S. App. D.C. 303, 134 F.2d 831 .....	11
Hagerty v. Olmstead, 39 App. D.C. 170 .....	11
MacMillan v. Knost, 75 U.S. App. D.C. 261, 126 F.2d 235 .....	12
Martin v. Staples, 82 U.S. App. D.C. 370, 164 F.2d 106 .....	14
Morgan v. Adams, 29 App. D.C. 198 .....	13
Olmstead v. Webb, 5 App. D.C. 38, 48 .....	11, 15
Towson v. Moore, 11 App. D.C. 377, aff'd. 19 S. Ct. 332, 173 U.S. 17, 43 L. Ed. 597 .....	12
Wiggins v. Smith, 87 U.S. App. D.C. 112, 183 F.2d 831 .....	11



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 20,303

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J. BENJAMIN SIMMONS,  
*Caveatee-Appellant,*

v.

ELSIE M. PINNEY,  
WALTER BAILEY,  
and  
MARIE BAILEY,  
*Caveators-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR APPELLEES

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## COUNTER-STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Columbia, denying probate and record of the paper writing dated July 1, 1965, purporting to be the last will and testament of Emma O. Lester, deceased. She died on September 1, 1965, at age 81, leaving an estate of about \$70,000. (J.A. 69) By the terms of the purported will she left \$3,000 to her brother Walter Bailey; \$3,000 to

her sister Elsie Pinney; \$1 to her sister Marie Bailey; \$3,000 to her nephew Raymond Bailey; \$500 to her neighbors Mr. and Mrs. Burdette, \$100 to Father Flannigan's Boys Town; \$100 to Aspin Hill Pet Cemetery; her Deale Beach Maryland property and collie dog Laddie to Raymond Leon Fisher, with the stipulation that he retain the property for Laddie's enjoyment during his lifetime; all the rest and residue to Raymond Leon Fisher of Arlington, Virginia, and his wife Evelyn as tenants in common. Appellant, J. Benjamin Simmons, was named as Executor (JA 1).

A petition for Probate and Letters Testamentary was filed by Appellant on October 8, 1965, listing Walter Bailey, a brother, and Elsie Pinney and Marie Bailey, sisters, as the only heirs at law and next of kin of testatrix. The brother and the two sisters filed a petition for caveat on October 27, 1965, asserting mental incapacity of the testatrix, and that the alleged will was procured by the undue influence, duress, coercion, fraud and deceit of Raymond Leon Fisher (JA 6). Appellant, caveatee below, filed an answer to this petition (JA 7). An order framing issues, between caveators and caveatee, for trial by jury was signed on November 10, 1965 (JA 9). Pretrial Proceedings were filed January 28, 1966, and the case came on for trial (JA 11).

Evidence disclosed that testatrix was born April 13, 1884 in Baltimore, Md.; soon thereafter the family moved to Quantico, Virginia. Testatrix attended school until she reached the third grade; she disliked school and played in the woods. She had scarlet fever when she was about three years old and it left her with an ear discharge which caused her trouble in later years. She was hard to get along with. You had to humor her. She dressed in a peculiar manner and wore the same style dress, which her sister Marie Bailey made for her for over thirty years (J.A. 40, 51, 123). About 1918 testatrix and her sister Elsie Pinney jointly purchased a house at 436 N.J. Avenue, S.E., which they occupied, with their mother and father, brothers Walter, Carroll and

Howard, and sister Marie, as a family residence, until about 1929 when an incident occurred in which testatrix struck her father with an umbrella, causing Elsie Pinney and her brother Carroll Bailey to move with their parents from the family residence to another house at 4901 Fifth Street, N.W.; Marie Bailey remained with testatrix at 436 N.J. Avenue, and helped her financially and physically to convert the family home into apartments for rental by testatrix, who was then employed at Government Printing Office. Despite the move Elsie Pinney, and brothers Walter and Carroll, also helped financially, and otherwise assisted testatrix in converting their former home into apartments. (JA 38) Testatrix was also helped financially, and with physical labor by her brothers and sisters and family, in the construction and maintenance of the Bay Front Deale Beach property. Before the cottage was built, the family went there for picnics (JA 60). Walter and Carroll Bailey did most of the construction on the sea wall; they also did the paneling on the inside of the building. Testatrix said the property was going to be the family place as all members of the family contributed time, money and services, over the years to improve it; testatrix told her sister Elsie Pinney that a real estate agent valued the Bay Front Deale Beach property at \$27,000, but she wanted to keep the property for use of all the family; testatrix told her brother, Walter Bailey, that she had refused an offer of \$26,000 for the Bay Front property because all members had helped and she wanted to keep it for the family; testatrix had two pieces of property at Deale Beach, Maryland, one was right on the Bay Front, and the other some distance back along the creek, but the Bay Front property was always supposed to be the family home there (JA 47, 49, 67, 75, 89). Testatrix advised Harold Haynes that she had made a will and that she was leaving this property to the family (JA 133). Testatrix also told BeBe Bailey that in her will the family would have the beach home, and that she was leaving Mr. Fisher her trailer (JA 99, 101, 103). Fisher had helped some with work on the sea wall, but testatrix had stated, often, and to many per-

sons, that Fisher was paid personally by her for everything he did (JA 46, 99). Mrs. Fisher testified that testatrix had a will before July 1, 1965, that she tore up (JA 243).

Testatrix met Raymond Leon Fisher when he went to work at Government Printing Office on October 13, 1939; he roomed at her house for the next month, and they have been good friends since; when his mother died in Ohio, she gave him \$100 and her car to go to her funeral, which he did not repay because "It was just mutual between us as between friends" (JA 165). Fisher did not have money to make a down payment on a house testatrix wished to sell, and the bank wanted 25 percent down so she said "Well you give me a personal note and I will tell them that you paid me the down deposit." So he did this and they both went to the building association where, in his presence, testatrix told the bank representative that Fisher had paid her \$2,500 when "I had not paid her a cent." He said he did not take that into consideration when he testified that testatrix had paid him \$2,000 cash in addition to gifts, but he worked out part of it he said "she gave me more in items than she did in money." The agreed price of the property was \$8,500, the building association loaned \$6,000 plus the \$2,500 note which was supposed to be paid. Fisher sold this property in 1949, for \$50 more than he paid for it, and then used the proceeds of sale as a down payment on the house he bought in Virginia. Mrs. Lester was not too happy about his moving to Virginia; she thought it would be pretty far away (JA 183, 184, 185). Fisher has been employed at Government Printing Office for the past 26 years, work hours from 5 P.M. until 1:30 A.M. the next morning, at a salary of \$9,000 yearly; in addition to his regular position with G.P.O. he worked as a bus driver for D.C. Transit for six years, from 1940 to 1946, and at Sears & Roebuck for four years, from 1949 to 1953, until he got ten years of service so he could qualify for Social Security coverage. His work at Sears as a salesman in the garden shop required working from 10 A.M. to 3 P.M.; and at D.C. Transit

his work hours were from six until ten in the morning. He now is employed as delivery man for Adams Company during all of which time he continued his regular employment at G.P.O. where he is still employed (JA 182, 183, 243).

Testatrix had trouble with her eyes and required use of a magnifying glass. Fisher said she needed glasses for several years. She could not read the newspaper without glasses and he would read for her some letters written in longhand, and make business calls for her and things like that (JA 172). Elsie Pinney testified that testatrix could not see to recognize her when she was two feet away and did not know her until she said, "this is Elsie" (JA 43). Her brother Walter said she could not see the meter gauge and her nephew Raymond Bailey testified that she could not see to recognize him when he was close to her until he said, "Its Ray." He later noticed that the eyeball of testatrix was getting cloudy (JA 94). BeBe Bailey, and several others testified that testatrix could not see to dial telephone and Fisher did it for her (JA 47, 100).

Raymond Leon Fisher, as a hostile witness, testified with reference to the alleged will, that at the request of testatrix he procured a will form at Woodhouse Printing Company about the first week of May 1965, and brought it to Mrs. Lester at 1525 S Street, S.E. She had moved there from 436 N.J. Avenue the last day of April 1965. She paid him \$250 to help with the moving. He identified the paper writing dated July 1, 1965 as typed on the form which he had previously procured. That day he telephoned from her home at 1525 S Street, S.E. to his daughter Nancy Ferraiuolo in Virginia and asked if she could come with her husband to 1525 S Street, S.E. It was then about 11:30 A.M. and Nancy returned his call advising that she and her husband would come between one and two P.M. He waited for them at 1525, met them at the door and they went to where Mrs. Lester was, collared the dog, and remained about 20 feet away. Then Mrs. Lester signed and his

daughter and son-in-law signed as witnesses. He did not know what Mrs. Lester said when she signed. Following the signing, the witnesses had a cup of tea and then left. He stayed and discussed the paper writing; he knew what was in it. After discussion she gave the alleged will to him and he put it in his pocket on July 1, 1965. He then took it to his home in Arlington, Virginia, and placed it in a box in which he had kept papers for Mrs. Lester for years. He kept it there until the morning following her death, when he took it to the office of Mr. J. Benjamin Simmons and turned it over to him. Mrs. Lester died September 1, 1965. He said he had known Walter Bailey, Mrs. Pinney and Mrs. Marie Bailey, the brother and sisters of testatrix, for 25 years, and considered them some of his best friends. He did not tell them anything about the will or its contents, and they did not know about it or its contents until called to the office of Mr. Simmons. Fisher said he did not prepare the paper writing. He is not a lawyer; he did not know who typed it; he does not type, and Mrs. Lester did not type (JA 151, 156).

J. Benjamin Simmons testified that he received the alleged will from Fisher a day or two after Mrs. Lester's death; he did not have anything to do with the preparation of the will; he had not seen the will prior to the time Fisher handed it to him; he had not specifically discussed the will with Mr. Fisher; Mrs. Lester did not ask him to draft a will; he did not prepare any other will for her; he does not know of any other instrument and that was the only will; he filed the alleged will at Court (JA 139, 142). Simmons testified he first met Mrs. Lester when she came to his office with Mr. Leon Fisher about 1962. She retained him as counsel in connection with a contest relating to the Bay Front property in Deale Beach; he received telephone calls from Fisher concerning the expected decision in the case; he saw Mr. Fisher with Mrs. Lester at all times when she came to his office; he said from his observations, the relationship between Mrs. Lester and Mr. Fisher: 'he was her right arm, so to speak, in handling her transac-

tions for her, and helping her take care of her business." From his observations of her feelings toward Mr. Fisher, "They were — seemed to be very close to each other. She relied on him heavily and she called him Leo." Question: "You have stated that Mr. Fisher was present with Mrs. Lester on all times when she came to your office?" Answer: "That is my recollection, Mr. Malloy, that he was present —, Yes." Question: "And you have stated that she — they were very close to each other and she relied on him explicitly in the matters?" Answer: "That is my impression, that he was her right arm" (JA 256, 257) Testatrix said she was dissatisfied with service of Appellant and asked her sister Elsie and her Brother Walter to get a Maryland attorney for her. She worried very much about the Bay Front Deale Beach litigation (JA 44, 69, 79, 104).

Mrs. Lester retired from Government Printing Office about July 1, 1947. Later she had a cancer operation at Providence Hospital in 1952, during which her sister, Marie Bailey stayed with her at night and her sister Elsie Pinney during the day (JA 124). Thereafter her mental and physical condition deteriorated, according to the testimony of her next of kin and other members of the family, to such an extent that they expressed opinions to the effect that she was not mentally competent to execute a valid deed or contract on July 1, 1965 (JA 84, 87, 93, 100, 109, 135). A qualified psychiatrist, in response to a hypothetical question, based on the facts in evidence, expressed the opinion that decedent was not mentally competent on July 1, 1965. He said: "in my opinion such a person was suffering from generalized and cerebral, that is, arteriosclerosis of the brain as well as her body" on July 1, 1965 (JA 146). The death certificate, showing the immediate cause of death as cerebral vascular-accident due to Arteriosclerosis (Generalized), had been introduced in evidence without objection (JA 23).

### SUMMARY OF ARGUMENT

It is not necessary that there be direct proof of undue influence. It may be proven by circumstantial evidence. Undue influence invalidating a will is nearly always a matter of inference from facts and circumstances disclosed by the evidence of the conditions and surroundings of the parties.

There was ample evidence in this case for the jury to infer, as it did infer, that undue influence had been exercised by Raymond Leon Fisher on the decedent to make the alleged will here in question. Appellant testified that Fisher was her right arm in handling her transactions and helping her take care of her business. He said she, an 81 year old widow, relied on him heavily and they were very close to each other. Fisher was the principal beneficiary of property which testatrix wished to leave to her family. He was not a blood relative. Fisher procured the will form at a stationery store; selected his daughter and her husband as witnesses; was present when the will was signed; there was no lawyer present, and the alleged will was typed on the form by some unknown person. Fisher took possession of the will after signing and kept it under his control until the death of testatrix two months later when he turned it over to appellant, a lawyer, who had nothing to do with the execution of the will and did not know of its existence until he received it from Fisher. He concealed the existence of the will and its contents from the brother and two sisters of decedent, although he had known them for 25 years and considered them his friends; he knew the contents of the will; he had previously accompanied testatrix to a building association where he heard her falsely state that Fisher had paid her \$2,500 when he had not paid her a cent, in order for him to procure a loan which had been refused because he did not have enough money to make the required twenty-five percent down payment on the purchase of her property.

The verdict was not contrary to the weight of the evidence. There was sufficient evidence to sustain the finding of the jury that Fisher had procured the will by undue influence.

The Court properly permitted the testimony of appellees to refute the contention of appellant that appellees were unwilling to render assistance to testatrix. When undue influence is sought to be proved to invalidate a will, any fact bearing at all on the point at issue is admissible in evidence, and the admissibility of such evidence is largely within the discretion of the Trial Court.

The Court did not err in commenting on the evidence concerning Raymond Leon Fisher's role in the preparation and execution of the alleged will. The Court properly instructed that the jury was the sole judge of the facts and appellant concedes that the learned Trial Court, with regard to the instructions as to the law, charged the jury in a very fair and proper manner.

#### ARGUMENT

##### I

###### **The Court Did Not Err in Refusing To Direct a Verdict for the Appellant on the Issue of Undue Influence. The Issue Was Properly Submitted to the Jury**

The case was submitted to the jury fully and fairly, after a six day trial, and with instructions as favorable to appellant as he could reasonably ask. No objection was made to the charge. The Court granted the prayer on undue influence as appellant requested.

The evidence disclosed that testatrix was an 81 year old widow, incapacitated by heart and eye trouble, and generalized arteriosclerosis. The principal beneficiary, Fisher, was a man of 49, very close to her, but not a blood relative, not a lawyer, but characterized by appellant,

who is a lawyer, as "her right arm" in handling her transactions and helping her take care of her business, who procured the will form for her at a stationery store, selected his daughter and son-in-law to act as witnesses, was present at the execution of the purported will, which was typed by an undisclosed person on the form Fisher previously procured, and which he took, immediately after signing on July 1, 1965, to his home in Virginia where he kept it until after the death of testatrix, two months later; that although he had been on friendly terms with caveators, a brother and two sisters of testatrix, he concealed from them the existence of the alleged will until after he delivered it to the nominated executor, an attorney who had nothing to do with its preparation or execution, and who had not seen it until delivered to him by Fisher, the principal beneficiary, about two days after her death on September 1, 1965. Although Fisher knew the contents of the alleged will, the brother Walter Bailey, and sisters Elsie M. Pinney and Marie Bailey did not know of its existence until notified by attorney Simmons after her death.

The will itself is an unnatural one and contains statements which would be changed if the testatrix could see, or know what she was doing. She lived at 1525 S Street, S.E. but the alleged will says, "1625 S Street, S.E.". She is designated as "testator" instead of testatrix. Fisher, who had possession of her personal papers, was instructed to deliver them to "Mr. Benjamin Simmons" whereas he was "J. Benjamin Simmons" as appears in the last paragraph with the "J" out of line on the original paper writing. Testatrix owned two pieces of property at Deale Beach, Maryland, the paper writing inferred only one. She had been highly critical of appellant and expressed lack of confidence in him prior to July 1, 1965. She would not have named him as executor of her will.

The evidence shows that testatrix intended to have the Bay Front Deale Beach property retained as a family home. She had advised Harold Haynes and BeBe Bailey that she had made her will to that effect.

This Court has held in many cases that when a will is opposed on the ground of undue influence, it is not necessary that there be direct proof of undue influence. Undue influence is nearly always a matter of inference from facts and circumstances disclosed by the evidence of the conditions and surroundings of the parties, and cannot, in its legal sense, be defined and applied in one case so as to present an accurate measure for the determination of another. *Wiggins v. Smith*, 87 U.S. App. D.C. 112, 183 F.2d 831; *Hagerty v. Olmstead*, 39 App. D.C. 170; *Duckett v. Duckett*, 77 U.S. App. D.C. 303, 134 F.2d 527. "The mental and physical condition of a testatrix, though not such as would of themselves render her incompetent to make a will, may properly be considered on the issue of undue influence." *Olmstead v. Webb*, 5 App. D.C. 38.

The cases cited in the brief of appellant as to presumption of undue influence are not applicable here. The Trial Judge did not hold or instruct that there is any presumption. He properly charged that it was for the jury to decide the facts and that the burden of proof was on the caveators, appellees here. The Court said:

"The burden of proof is on the parties objecting to the probate of the will to establish their objections by a fair preponderance of the evidence. In other words, the burden is not on the executor to establish that the testatrix was mentally competent or that the will was not procured by undue influence. The burden of proof is on the parties objecting to the probate of the will to establish either that the testatrix was mentally incompetent, or, second, that the will was procured by undue influence. This burden of proof must be sustained by a fair preponderance of the evidence." (JA 296)

The cases cited by appellant are readily distinguishable from the case at bar. Each case must rest on the facts involved. It is not necessary to have direct proof of undue influence. Undue influence is nearly

who is a lawyer, as "her right arm" in handling her transactions and helping her take care of her business, who procured the will form for her at a stationery store, selected his daughter and son-in-law to act as witnesses, was present at the execution of the purported will, which was typed by an undisclosed person on the form Fisher previously procured, and which he took, immediately after signing on July 1, 1965, to his home in Virginia where he kept it until after the death of testatrix, two months later; that although he had been on friendly terms with caveators, a brother and two sisters of testatrix, he concealed from them the existence of the ~~all~~ged will until after he delivered it to the nominated executor, an attorney who had nothing to do with its preparation or execution, and who had not seen it until delivered to him by Fisher, the principal beneficiary, about two days after her death on September 1, 1965. Although Fisher knew the contents of the alleged will, the brother Walter Bailey, and sisters Elsie M. Pinney and Marie Bailey did not know of its existence until notified by attorney Simmons after her death.

The will itself is an unnatural one and contains statements which would be changed if the testatrix could see, or know what she was doing. She lived at 1525 S Street, S.E. but the alleged will says, "1625 S Street, S.E.". She is designated as "testator" instead of testatrix. Fisher, who had possession of her personal papers, was instructed to deliver them to "Mr. Benjamin Simmons" whereas he was "J. Benjamin Simmons" as appears in the last paragraph with the "J" out of line on the original paper writing. Testatrix owned two pieces of property at Deale Beach, Maryland, the paper writing inferred only one. She had been highly critical of appellant and expressed lack of confidence in him prior to July 1, 1965. She would not have named him as executor of her will.

The evidence shows that testatrix intended to have the Bay Front Deale Beach property retained as a family home. She had advised Harold Haynes and BeBe Bailey that she had made her will to that effect.

This Court has held in many cases that when a will is opposed on the ground of undue influence, it is not necessary that there be direct proof of undue influence. Undue influence is nearly always a matter of inference from facts and circumstances disclosed by the evidence of the conditions and surroundings of the parties, and cannot, in its legal sense, be defined and applied in one case so as to present an accurate measure for the determination of another. *Wiggins v. Smith*, 87 U.S. App. D.C. 112, 183 F.2d 831; *Hagerty v. Olmstead*, 39 App. D.C. 170; *Duckett v. Duckett*, 77 U.S. App. D.C. 303, 134 F.2d 527. "The mental and physical condition of a testatrix, though not such as would of themselves render her incompetent to make a will, may properly be considered on the issue of undue influence." *Olmstead v. Webb*, 5 App. D.C. 38.

The cases cited in the brief of appellant as to presumption of undue influence are not applicable here. The Trial Judge did not hold or instruct that there is any presumption. He properly charged that it was for the jury to decide the facts and that the burden of proof was on the caveators, appellees here. The Court said:

"The burden of proof is on the parties objecting to the probate of the will to establish their objections by a fair preponderance of the evidence. In other words, the burden is not on the executor to establish that the testatrix was mentally competent or that the will was not procured by undue influence. The burden of proof is on the parties objecting to the probate of the will to establish either that the testatrix was mentally incompetent, or, second, that the will was procured by undue influence. This burden of proof must be sustained by a fair preponderance of the evidence." (JA 296)

The cases cited by appellant are readily distinguishable from the case at bar. Each case must rest on the facts involved. It is not necessary to have direct proof of undue influence. Undue influence is nearly

always a matter of inference. The Court in instructing the jury covered the quotations in the *Towson v. Moore* case at page 14 of the brief of appellant, and on page 15 the quotation from *MacMillan v. Knost*, 75 U.S. App. D.C. 261, 126 F.2d 235.

Fisher knew well how to keep testatrix under his control. He advised her sister Elsie Pinney, when she was discussing the manner in which testatrix had cussed at her, "Well, you know, if she starts fussing at me I just stay away from her for a while" (JA 47).

## II

**The Verdict Was Not Contrary to the Overwhelming Weight of the Evidence**

Appellant concedes that the Trial Court charged the jury in a very fair and proper manner with regard to the instructions as to the law. The principal argument urged for a reversal is that the verdict was contrary to the overwhelming weight of the evidence. Two issues were submitted to the jury. First, was Emma Lester mentally capable of executing the will. Second, was the will procured by undue influence on the part of Raymond Leon Fisher. The jury answered yes to both. There was a substantial conflict of testimony on both points. The jury's request for further instructions indicated a careful scrutiny of the language of each issue, and it seems clear their verdict indicated a discriminating consideration of all the evidence. The question of fact was for the jury to determine, and an examination of the record will disclose their finding was not against the weight of the evidence. The Trial Court gave the instruction on undue influence as requested by appellant. The Trial Court charged the jury that the burden of proof was on the caveators -appellees.

There was ample evidence to support the finding of undue influence. Testatrix expressed the wish and desire that the Bay Front Deale Beach

should remain in the family. She told her brother that she had a "sale for it at \$26,000" but refused to sell because they all had put so much work into the place, "I just wouldn't feel right selling it, no matter what price I got for it, and I think I am going to go on and just keep it as it is because I would like to keep it in the family" (JA 67). Testatrix told Harold Haynes that she had a will and that she was leaving the property to her family. She also told BeBe Bailey that "the family would have the beach home".

Evidence indicated testatrix had several wills. Fisher testified that he had an original will allegedly made in 1952 which testatrix asked him three times to return as she wanted to make some changes. He said she wrote a will after her brother Carroll died, and testatrix told him she put Raymond Bailey in for an equal share at that time (JA 196, 197, 199). The parties stipulated that Carroll Bailey died on December 25, 1958. (JA 274)

In discussing a will with her brother she said: "Walter, look out for me; if I die, please see that I am buried in the Cedar Hill lot. And says, "you're not going to want: in fact, the family ain't going to want very much after I am gone, I am going to help an awful lot." See discussion under I, *infra*.

This Court, in the case of *Morgan v. Adams*, 29 App. D.C. 198, 206, said:

"It is the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony, under proper instructions for their guidance, which, as we have seen, were given as requested by the appellants. It is only when, conceding the credibility of the witnesses, and giving effect to every legitimate inference that may be deduced from their testimony, the party having the burden of proof upon an issue has plainly not made out a case sufficient in law to entitle him to a verdict, that the Court is justi-

fied in withdrawing the issue from the consideration of the jury". See also *Barbour v. Moore*, 10 App. D.C., 30, 49.

In the case of *Martin v. Staples*, 82 U.S. App. D.C. 370, 164 F.2d 106, the Court dismissed the appeal on another ground, but having read the record said:

"Appellant is the beneficiary of a will which has been denied probate because the jury found that the will had been procured by undue influence, duress or coercion, Appellant, conceding that the definitions of undue influence, duress and coercion in the instructions of the trial judge to the jury were correct, urges that there was no evidence to support the jury's verdict.

"We find that the evidence was ample".

The Trial Court, at the hearing of the Motion for Judgment N.O.V. or in the alternative for a new trial, stated:

"I remember the facts very well. I am not going to go over them again.

I am going to let this verdict stand, Mr. Poston. There were very suspicious circumstances here. Not only did the beneficiary procure the blank forms, but he supervised the execution of the will. There was no lawyer present. He brought his own daughter and her husband as witnesses. I felt that there was a case for the jury. What I would have decided if there was no jury is immaterial, but I thought there was enough for the jury.

Of course, each case must stand on its own feet. I am not going to disturb this verdict.

Mr. Poston: Thank you, Your Honor." (JA 315)

## III

**The Court Did Not Err in Permitting Testimony by Appellees  
To Refute Contention of Appellant That Appellees Were  
Unwilling To Render Assistance to Testatrix**

Appellant contended that it was natural for testatrix to give everything to Fisher although not a blood relative, because he had assisted her for a period of twenty-five years "out of friendship and not for compensation"; that testatrix became less friendly with her brother and sisters, especially Marie Bailey, from whom she was completely alienated. The appellees had a right to show the friendly attitude of Marie Bailey toward her sister for whom she had made dresses for thirty years. She endeavored to explain that she had obtained a war-time position and could no longer do the dressmaking. Fisher testified that he accompanied Testatrix to the Rent Control Board in an effort to compel Marie Bailey to pay an increased rent on property which she contended she owned. Fisher had taken control of testatrix, and was endeavoring to convince her that her relatives were not sympathetic with her problems, and were unwilling to take the time and trouble to render her any real assistance. The facts were that her brother and sister were willing to assist in any way. She had stated that she paid Fisher for everything he did for her; she paid him \$250 for assisting her in moving on April 30, 1965, and <sup>he</sup> admitted receiving \$2,000 in cash and more than that in other gift items; testatrix bought him hats, suits, and other household gifts. The testimony was within the discretion of the Court:

"When undue influence is sought to be proved to invalidate a will, any fact, no matter how slight, bearing at all upon the point at issue, and not wholly irrelevant, is admissible in evidence, and the admissibility of such evidence is largely within the discretion of the Trial Court." *Olmstead v. Webb*, 5 App. D.C. 38.

## IV

**The Court Did Not Err in Commenting on the Evidence Concerning Raymond Leon Fisher's Role in the Preparation and Execution of the Will. The Court Properly Instructed That the Jury Was Sole Judge of Facts**

The instructions given to the jury were full and correct. Appellant concedes that "The learned Trial Court, with regard to the instructions as to the law, charged the jury in a very fair and proper manner" (App. Br., 22).

There was a conflict in the evidence which necessitated a jury finding to resolve the conflict. The Court properly instructed as follows:

"You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence, and solely on the basis of the evidence introduced at this trial; and then having found the facts, it is your function to apply to them the rules of law that I shall discuss.

"In addition to instructing the jury as to the law, the Court has a further function to perform, namely, to summarize, discuss and comment on the facts and on the evidence to the extent to which it appears to the Court desirable to do so. This is done, however, solely in order to aid and assist the jury in arriving at its conclusions on the facts. The Court's summary, discussion and comments on the facts and on the evidence are not binding on you, they are intended only to help you and you need attach to them only such weight as you deem wise and proper. If your understanding or your recollection or your view of the evidence in any respect differs from mine, then it is your understanding, your recollection and your view of the evidence that must prevail because, I repeat, the final decision on the facts is solely within your province. The jury, so to speak, are the sovereigns when it comes to decision on the facts. My instructions are binding on you only as concerns the law" (JA 293).

The Court further instructed:

"Now, I shall review and summarize very briefly some of the salient features of the evidence on this aspect of the case and I want to repeat to you what I said at the opening of my remarks, what I say about the evidence, my summary of it and my discussion of it is intended only to help you, it is not binding on you. I may omit some items of evidence that you may consider important, I may perhaps mention some that you consider insignificant. The decision on the facts is your function, your duty and your responsibility." (JA 299)

The comments were fair and in accord with the evidence. The Trial Court properly instructed the jury and did not err in commenting on the evidence.

#### CONCLUSION

In conclusion it is respectfully submitted that a correct analysis of the facts, relative to each of the points asserted by appellant, shows the absence of any reversible error; that the Trial Court properly instructed the jury and the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

NO. 20,303

FILED OCT 28 1966

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J. BENJAMIN SIMMONS

*Caveatee-Appellant,*

vs.

ELSIE M. PINNEY  
WALTER BAILEY

and

MARIE BAILEY

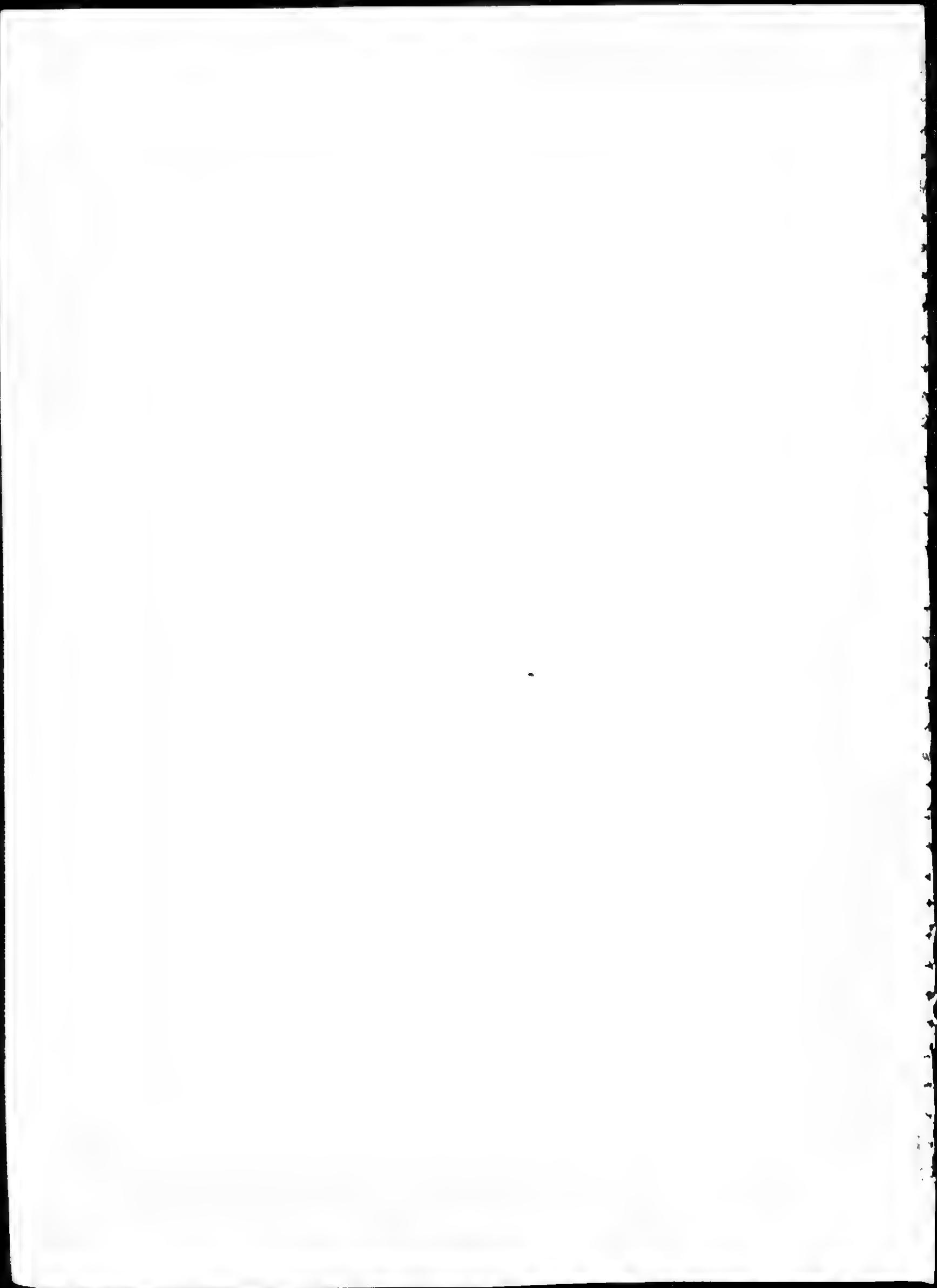
*Caveators-Appellees.*

APPEAL FROM ORDER DENYING PROBATE

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(i)

TABLE OF CASES

Barbour v. Moore, 10 App. D.C. 30 .....	7
Duckett v. Duckett, 77 U.S. App. D.C. 303, 134 F.2d 527 .....	5, 6
Hagerty v. Olmstead, 39 App. D.C. 170..	5
MacMillan v. Knost, 75 U.S. App. D.C. 261, 126 F.2d 235 .....	7
Martin v. Staples, 82 U.S. App. D.C. 370, 164 F.2d 106 .....	7
Morgan v. Adams, 29 App. D.C. 198.....	7
Olmstead v. Webb, 5 App. D.C. 38, 48 .....	6
Towson v. Moore, 11 App. D.C. 377, aff'd. 19 S. Ct. 332, 173 U.S. 17, 43 L.Ed. 597 .....	7
Wiggins v. Smith, 87 U.S. App. D.C. 112, 183 F.2d 831 .....	4, 5



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## REPLY BRIEF FOR APPELLANT

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A close study of the appellees' brief reveals a dearth of factual, relevant material on which to press their claim of undue influence. The appellees have gone into great detail concerning the educational background of the testatrix, her peculiarity of dress, her manner of getting bank financing for Fisher, her abusive action toward her father, her bad eyesight, her mental condition, and her Maryland law suit. None of this information is in any way connected with the remaining

issue before this Court; namely, whether there was sufficient evidence of undue influence to permit the case to go to the jury.

Emphasis has been placed by the appellees on the testimony of the appellant to the effect that Fisher was her "right arm," and this was no doubt true. He was also her right leg, because he performed most of her errands for her. However, he was not her will, her mind nor her power of discretion. The testatrix unquestionably made her own decisions.

Appellees complain that the will was an unnatural will and had several discrepancies. Although the will was apparently homemade and drawn by someone who was not well versed in the law and not very well educated, it still met all the requirements under the laws of the District of Columbia. The will was much the type will that one would expect to be composed by a woman of the character and the background of the testatrix. Assuredly, there is nothing in the form and wording of the will which would, in any way, suggest undue influence.

Appellees have, apparently, placed great importance on the fact that Fisher did not reveal to the appellees the contents of the will of the testatrix while she was still living. Obviously, such a disclosure by Fisher would have been highly improper and unethical and no doubt would have highly incensed the testatrix if it came to her knowledge. After all, a will is a very personal and sacred document to the one making it and should not be dealt with lightly by other parties. Can one say that Fisher had the duty of informing her brothers and sisters of this will, when the testatrix chose not to make this disclosure? The testatrix had ample opportunity to do so, if she so chose.

Appellees make reference to the testimony of Elsie Pinney, Walter Bailey, Bebe Bailey, whose testimony was completely discredited (JA 99, 180) and Harold Haynes, whose statements were equally as implausible, concerning somewhat vague statements, most of which

were not established as to time, allegedly made by the testatrix to the effect that the beach property was for "the family"; that she was going to leave it to "the family"; that "the family" was not going to want very much "after I am gone." It was interesting how frequently the words, "the family," cropped up in their testimony.

It is incredible that the testatrix would have made such statements during the last twelve years of her life, for she was completely alienated from part of "the family," i.e., the appellee, Marie Bailey, for at least the last twelve years of her life. The evidence that makes such testimony even more incredible is the will proved by disinterested witnesses, executed by the testatrix in 1952, in which she left the large beach property to Fisher.

However, after giving to these alleged statements made by the testatrix full credibility, can we say that this is evidence of undue influence? Certainly, other conclusions derived from these statements are at least as plausible. The testatrix may have chosen not to have been completely candid with her relatives, or she simply may have changed her mind, a prerogative that members of the fair sex from the beginning of time have freely exercised.

One must not lose sight of the fact that the testatrix did not leave the family penniless. She left them Nine Thousand Dollars (\$9,000.00), which to the testatrix, taking into consideration her frugal nature, was a tremendous amount of money.

Nothing more eloquently points out the weakness of the claim of undue influence than the attempt by the appellees to read some sinister control of the testatrix by Fisher into this following statement made by Fisher to the appellee, Elsie Pinney: "Well, you know, if she starts fussing at me, I just stay away from her for awhile." Can these words, through any stretch of the imagination be construed to be indicative of domination on the part of Fisher? To the contrary, it is most obvious

that the testatrix became so dominating toward Fisher at times that he was forced to retreat. Certainly, a man has the right to retreat from the line of fire without being guilty of taking unfair advantage of the aggressor.

Significantly, nowhere in the appellees' brief is there any contention of the existence of a confidential or fiduciary relationship between the testatrix and the principal beneficiaries.

The appellees have cited several cases which they claim as support for their contention that there was ample evidence of undue influence to justify the deliberations of the jury. It is the position of the appellees that undue influence can be inferred and does not necessarily have to be proved by direct evidence. This proposition is true only if three elements are present in the case; namely, (1) a confidential relationship between the testator and the principal beneficiary, (2) activity in the preparation and execution of the will, and (3) the will, thus procured, confers a benefit upon the person, who, while occupying a position of confidence, participated in procuring the execution of the will. All the cases relied upon by the appellees either contained all three of these elements or there was the presence of direct evidence of undue influence.

The appellees have cited superficially several cases, but have failed to "come to grips" with the specific facts of the situation in each case.

In the case of *Wiggins vs. Smith*, 87 U.S. App. D.C. 112, 183 F.2d 831, contrary to the instant case, there was definitely proved a confidential and fiduciary relationship between the testatrix and the principal beneficiary. Also, contrary to the instant case, in the *Wiggins* case, the principal beneficiary took an active part in the actual preparation of the will, in engaging the attorney and by giving him the instructions as to the contents thereof, in addition to arranging for the witnesses. In

the *Wiggins* case, the principal beneficiary took such an active part in the actual preparation of the will that naturally a presumption arose that this was more the will of the principal beneficiary than of the testatrix.

The appellees also rely on the case of *Hagerty vs. Olmstead*, 39 U.S. App. D.C. 170. Again, there existed in the *Hagerty* case a fiduciary and confidential relationship. The testatrix was *in extremis* and died twenty-four hours after the will was executed. The principal beneficiary suggested that she make a will; he drew up the will arbitrarily omitting one of her bequests; and he summoned witnesses and supported her in bed while she signed the will. In the *Hagerty* case, as in the *Wiggins* case, the principal beneficiary played such a dominant part in the actual preparation of the will that the presumption arose that it was more the will of the principal beneficiary than the will of the testatrix.

In the instant case the testatrix was not *in extremis*; she was carrying on various activities more than two months after the execution of the will; the testatrix and the principal beneficiaries were not in a confidential or fiduciary relationship; the principal beneficiaries had nothing whatsoever to do with the actual preparation of the will; and they at no time suggested that she make a will.

In the case of *Duckett vs. Duckett*, 77 U.S. App. D.C. 303, 134 F.2d 527, on which the appellees also rely, the facts were so aggravated that this Court remanded the case for a new trial, not only on the issue of undue influence but also on the issue of fraud. There was evidence introduced in the case showing that the principal beneficiary, a sister of the testatrix, a registered nurse, who lived in Philadelphia, came to Washington when the testatrix had been in the hospital for three weeks and arbitrarily took her home, although she had not asked to be taken home, and although two doctors advised against it. The principal beneficiary, in that case, had not previously attended testatrix or done anything for her. She then took complete charge of her, repeatedly pre-

venting her relatives from seeing her and falsely telling them that she did so under the instructions of the physicians. Evidence showed that the principal beneficiary made false statements to the relatives of the testatrix with the purpose and effect of inducing them not to visit the testatrix, and then falsely pointing out to the testatrix that her relatives were making no efforts to see her, were doing nothing for her and showing no interest in her welfare. The *Duckett* case clearly showed affirmative activity on the part of the principal beneficiary to alienate the testatrix from her other relatives. This was direct evidence of undue influence.

In the instant case, there is absolutely no evidence of any attempt on the part of the principal beneficiaries to alienate in any way the testatrix from her relatives. To the contrary, there was ample evidence showing that Fisher took the testatrix on visits to her relatives and that he maintained a very friendly relationship with her relatives, and considered them as some of his best friends. The testatrix mingled freely with her relatives until the time of her death.

In the case of *Olmstead vs. Webb*, 5 App. D.C. 38, 48, on which appellees also rely, the jury brought back a verdict in favor of the caverator on the issue of lack of mental capacity, as well as undue influence. In that case, there was great evidence showing very active steps taken by the husband, not only to influence his wife to make him principal beneficiary under her will, but also to influence other members of her family, including her father, to shift her family's estate within his field of influence. There was evidence to show that the testatrix, the wife of the principal beneficiary, was of a weak and gentle character, easily influenced and controlled, and that she was completely under the influence of the principal beneficiary, who was strong willed, domineering, and despotic. Despite these aggravated circumstances, this Court reversed the Trial Court and remanded the case for a new trial on all the issues. It is difficult to understand how that case in any way, gives comfort to the appellees in the instant case.

The case of *Morgan vs. Adams*, 29 App. D.C. 198, cited by appellees, deals, not with the question of undue influence, but with the issue of testamentary capacity. The case of *Barbour vs. Moore*, 10 App. D.C. 30, referred to in the *Morgan* case, does not furnish any support to the appellees in the instant case.

The appellees have also cited the case of *Martin vs. Staples*, 82 U.S. App. D.C. 370, 164 F.2d 106, to support their position. In that case, there was ample evidence to show that the principal beneficiary was an unscrupulous woman who made a practice of living off of other people and had defrauded the government. She posed as a fortune teller. She kept the testator up until 2:00 a.m. on two successive evenings, just prior to the execution of his will, while the testator was very ill and in a weak condition, both mentally and physically. She was seen tearing up papers in his room the following morning. The attorney who drew up the will testified for the caveator, stating that the testator, at the time of the execution of the will was ill and extremely nervous; that the principal beneficiary had great influence over him; that she had convinced the testator that she was an eminent astrologer; and that he relied very much upon her advice and predictions.

In the instant case, there was a total absence of any act showing any undue influence brought to bear on the testatrix and a complete absence of any improper actions on the part of the principal beneficiaries.

Surprisingly enough, the appellees have also cited *MacMillan vs. Knost*, 75 U.S. App. D.C. 261, 126 F.2d 235, and *Towson vs. Moore*, 11 App. D.C. 377, aff'd. 19 S. Ct. 332, 173 U.S. 17, 43 L. Ed. 597, two of the most persuasive cases supporting appellant's position in this case, which are discussed in detail in appellant's brief.

One question begs to be answered. What was the nature of this mysterious and terrible influence that completely destroyed the will and free agency of the testatrix? Fisher did not trick her, for this

would be fraud, and the Court has ruled as a matter of law that there was no fraud involved. He did not threaten her, for this would be duress or coercion, and the Court has ruled as a matter of law that there was no duress or coercion. It could not be influence based on friendship, kindness, service or need, for the Court instructed the jury that this type of argument and persuasion is not undue influence. The only conclusion that can be reached is that there was no undue influence. Unquestionably, the principal beneficiaries influenced the testatrix. It was, however, the influence gained by kindness, affection, loyalty, service and attention over the last twenty-five years of the life of the testatrix.

This case involves a very precious and fundamental property right. This right should not be defeated by mere suspicion and speculation based upon shadow and innuendo.

Respectfully submitted,

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